

Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief

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I. INTRODUCTION

The trouble with the sovereign immunity doctrine is that it interferes with consideration of practical matters, and transforms everything into a play on words.¹

These words were spoken by supporters² of a partial abolition of the federal government's sovereign immunity, since adopted as an amendment to 5 U.S.C. § 702.³ Section 702 permits federal district courts to enter "relief other than money damages" against the United States.⁴ The aforementioned criticism of sovereign immunity was reiterated in *Bowen v. Massachusetts*, the Supreme Court's first occasion to interpret section 702.⁵ The trouble is, while trying to discern the reach of the statute, the Court adopted new tests which similarly hinder "consideration of practical matters, and transform[] everything into a play on words."⁶

Strangely, both the majority and the dissent fall into the same decision-by-category trap, although the dissent sends up useful warning flags for the future. Because *Bowen* fails to answer correctly the complex issues before the Court, and also because section 702 poses still other conundrums not raised in *Bowen*, the lower courts will need guidance in determining where to go next. This Article will attempt to provide that guidance.

The courts have faced three especially thorny questions in trying to interpret the

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1. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2741 (1988) (quoting Sovereign Immunity Hearing on S. 3568 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., at 115 (1970), quoting Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 J. Pub. L. 1, 22 (1960), quoting from a letter written by Professor Walter Gellhorn).

2. *Id.*

3. 5 U.S.C. § 702 (1982). The full text of that section as amended is as follows:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations or judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

4. Pub. L. No. 94-574, 90 Stat. 2721 (1976) (codified as amended at 5 U.S.C. § 702 (1982)). This statute also erased other barriers to government claims litigation, by abolishing the relevant jurisdictional minimum amount from 28 U.S.C. § 1331 (1982); and by clarifying that the United States is not an indispensable party in such litigation. The "1976 amendment" and "section 702" are used herein to mean only the waiver of sovereign immunity.

5. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2741.

6. See *supra* note 1 and accompanying text.

1976 waiver statute. When does section 702 permit relief in the form of money? When do existing damage remedies forestall nondamage relief? And finally, should the district courts be limited drastically in their new powers for fear of undercutting the Claims Court?⁷ The correct answers to these questions, as this Article will show, are the following: The 1976 waiver subjects the government to nondamage money relief with almost no sovereign immunity limitation.⁸ It impliedly precludes such remedies only where they are inconsistent with other remedies or overriding policy concerns.⁹ Finally, it makes appropriateness rather than availability the touchstone for choosing among remedies.¹⁰ The statute achieves a minor miracle by opening up crucial alternative remedies for litigants while simultaneously minimizing government costs.

In order to appreciate section 702, we must first start with its background and history.

II. SOVEREIGN IMMUNITY—PURPOSES AND EXCEPTIONS

A. Tradition and History

Sovereign immunity bars suit against the government absent its consent.¹¹ Governmental immunity from suit is so firmly entrenched as to be substantially beyond question in the federal courts.¹² The doctrine has been attacked, however, by occasional judicial¹³ and frequent academic commentators.¹⁴ Justifications for the

7. The Claims Court, an Article I court which entertains only suits against the United States, succeeded to the trial jurisdiction of the Court of Claims in 1982. Pub. L. No. 97-164, 96 Stat. 25, Title I (1982). Sacrificing historical accuracy for otherwise harmless readability, this article refers to the "Claims Court" throughout.

8. The only exception is for agencies outside the coverage of the Administrative Procedure Act. *Clark v. Library of Congress*, 750 F.2d 89, 102-04 (D.C. Cir. 1984).

9. See *infra* notes 65-74 and accompanying text.

10. A whole host of doctrines other than sovereign immunity limit or channel judicial review of agency action. See, e.g., Block, *Suits Against Government Officers & the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1062 (1946) [hereinafter Block, *Suits Against Government Officers*]. A given opinion may invoke not only sovereign immunity issues, but also one or more other doctrines governing review. See, e.g., *United States v. Testan*, 424 U.S. 392 (1976); *Lee v. Blumenthal*, 588 F.2d 1281 (9th Cir. 1979). This Article will suggest that categorical limits be minimized and flexible approaches taking into account individualized facts be maximized. For similar suggestions, see Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 64, 79 (1984) [hereinafter Shapiro, *Wrong Turns*] (states' eleventh amendment immunity).

11. *United States v. Lee*, 106 U.S. 196 (1882).

12. See, e.g., *United States v. Sherwood*, 312 U.S. 584 (1941) (requiring strict construction of congressional waivers of immunity); *but see Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 521 (1984); *Lynch v. United States*, 292 U.S. 571, 581 (1934) (more liberal construction). Sovereign immunity goes to the issue of jurisdiction, *United States v. Mitchell*, 463 U.S. 206, 212 (1983), and may therefore be raised at any time, including on appeal. *People v. Quenchan Tribe*, 595 F.2d 1153 (9th Cir. 1979).

13. See, e.g., *Welch v. State Dep't of Highways and Public Transp.*, 107 S. Ct. 2941 (1987) (Brennan, J., dissenting); *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 309-11 (1973) (Brennan, J., dissenting) (challenge most important part of states' immunity to federal suit under eleventh amendment).

14. See, e.g., Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Borchard, *Governmental Responsibility in Tort VI*, 36 YALE L.J. 1 (1926); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962) [hereinafter Byse, *Proposed Reforms*]; Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 389 (1970) [hereinafter Cramton, *Nonstatutory Review*]; Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public Lands Cases*, 68 MICH. L. REV. 867 (1970) [hereinafter Scalia, *Sovereign Immunity*].

doctrine may be usefully conceived in terms of the relationships potentially affected by sovereign immunity.

(1) Some have explained the doctrine in terms of government primacy as against the aggrieved citizen. The old saw, "The king can do no wrong,"¹⁵ was usually interpreted to mean that the sovereign is incapable of error in the eyes of the law.¹⁶ A refinement admits that government makes mistakes, yet posits that supreme law-giving authority is inconsistent with subjection to the law it creates.¹⁷ The American preference for popular government must, however, reject any argument that places government above the law.

(2) Sovereign immunity may be explained more fruitfully, but still looking outwardly from the seat of power, by the relationship between government and its citizens collectively. Government is obligated to husband its resources for the benefit of all. Sovereign immunity protects our common resources by forcing individuals to bear their own losses suffered at the hands of government.¹⁸

(3) Finally, some suggestions look internally, to the relationship among branches of government, for federal sovereign immunity's rationale. Thus, a now-discarded theory suggested that courts should not entertain suits when they had no enforcement power over the executive.¹⁹ More modern theorists take a separation-of-powers approach. This theory notes that the federal judiciary is unelected, that the executive or legislative officials usually sued are electorally accountable, and that lawsuits, whether successful or unsuccessful, inhibit government action.²⁰ Sovereign immunity is thus justified, if at all, as a means of protecting the freedom of action of the elected branches from judicial incursions.

The strict separation of powers approach implied by sovereign immunity has obvious problems.²¹ It both denies those aggrieved any remedy for uncompensated governmental errors, and deprives the polity of a significant incentive toward official compliance with the law. Motivated by these concerns, more than one branch of government has responded. Congress has consented to most suits against the United States and the courts periodically have created compromise doctrines which sometimes permit suit where Congress has not consented.

15. COKE, *INSTITUTES* 73 (2d Am. ed. 1836).

16. Borchard, *Governmental Responsibility in Tort VI*, 36 *YALE L.J.* 1, 17-41 (1926), and Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 *HARV. L. REV.* 1 (1963), demonstrated convincingly that the phrase has been misconstrued, and that ample remedies were available for unlawful government actions in Britain prior to the American constitution.

17. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (Holmes, J.).

18. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821) (Marshall, J.) (eleventh amendment designed to shield states from compelled debt payment). This reasoning has obvious affinities to limited duty concepts in tort. As tort duties expand and government waivers of immunity multiply, this approach has less and less appeal. See the explicit constitutional provision for compensation for takings of property. U.S. CONST. amend. V. See also *United States v. Causby*, 328 U.S. 256, 267 (1946).

19. Cramton, *Nonstatutory Review*, *supra* note 14, at 397. See also *Gliddon v. Zdanok*, 370 U.S. 530, 570-71, *reh'g denied*, 371 U.S. 854 (1962) (finding judicial authority to entertain suit despite dependence upon the other branches to enforce judgment).

20. See, e.g., Cramton, *Nonstatutory Review*, *supra* note 14, at 397.

21. Any strict separation of powers approach has problems. Compartmentalization of government ignores the unavoidable and often healthy tension created by competing powers. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 *MICH. L. REV.* 592, 603 (1986).

The most frequently invoked waivers of sovereign immunity permit damage actions. The century-old Tucker Act permits suits for damages founded upon contract or any violation of the constitution, statutes, or regulations.²² The newer Federal Tort Claims Act (FTCA) authorizes tort damage actions.²³ Both statutes waive sovereign immunity only to the extent of permitting damage claims.²⁴

A judicial exception to sovereign immunity recognizes "officer suits."²⁵ If a government official is found to have acted unconstitutionally or outside her allotted powers, this fiction holds that she may be sued.²⁶ The officer suit device permits a plaintiff to avoid immunity by not naming the United States as a party, even though relief effectively will be against the government.

Out of officer suits grew the tradition of so-called nonstatutory review of government action. Although modern statutes often provided explicitly for judicial review of newly created agencies, many departments and officials were not covered by such review.²⁷ The officer fiction, where it applied, permitted the federal courts to skirt sovereign immunity and award injunctive, mandamus, or declaratory relief when appropriate.

There matters stood as of 1949. Congress had authorized many if not most damage actions against the United States and its agencies.²⁸ The courts, working separately, created a fictional but useful bypass of sovereign immunity to permit restraint of unconstitutional or unlawful government action by ordering nondamage relief. In 1949, however, the Supreme Court cut back sharply on the usefulness of the officer suit. In footnote 11 to its decision in *Larson v. Domestic & Foreign Commerce Corp.*,²⁹ the Court declared that suit may fail despite the officer suit exception if relief would require:

- a. affirmative action, or
- b. disposition of unquestionably sovereign property.

Larson provoked both confusion and judicial rebellion. *Larson* confused observers because of the uncertain sweep of footnote 11. What could it possibly mean? Does not mandamus by definition call for affirmative action? Further, does not every government action, including *stopping* action, cost money (sovereign property)?³⁰ Where, short of banning every officer suit, should the sovereign immunity line be drawn?

22. 28 U.S.C. §§ 1346(a)(2), 1491 (1982).

23. The FTCA is fragmented in the Code. *See especially* 28 U.S.C. § 1346(b) (1982) (district court jurisdiction exclusive).

24. *Richardson v. Morris*, 409 U.S. 464 (1973) (Tucker Act); *Moon v. Takisaki*, 501 F.2d 389 (9th Cir. 1974) (FTCA). Two important qualifications are required as to the Tucker Act. Money relief may sometimes be awarded even though it is not technically damages. *Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967). Further, some powers to award nonmoney relief have been added to the Tucker Act. 28 U.S.C. § 1491 (1982).

25. *Ex parte Young*, 209 U.S. 123 (1908).

26. Although *Young* concerned the eleventh amendment immunity of the states from suit in federal court, its fiction has been used consistently in federal sovereign immunity cases as well. *See, e.g., Philadelphia Co. v. Stimson*, 223 U.S. 605, 619-20 (1912).

27. Byse, *Proposed Reforms*, *supra* note 14, at 1480-81.

28. Apart from the Tucker Act and the FTCA, many agencies were stripped of sovereign immunity by authorization to "sue or be sued." *See, e.g., Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381 (1939).

29. 337 U.S. 682, 691 n.11 (1948), *reh'g denied*, 338 U.S. 840 (1949).

30. *Cf. United States v. Briggs*, 514 F.2d 794, 808 (5th Cir. 1975) (suit to expunge indictment).

Left without clear guidance, some courts struggled to limit *Larson*. One line of cases, for example, exploited the decision's equivocal language "may fail," and made sovereign immunity turn upon the magnitude of the governmental burden threatened by the requested relief.³¹ Ultimately, all such formulae failed to meaningfully distinguish between suits which should be barred absolutely and those which should proceed.³²

Other courts, even the Supreme Court, often ignored the sovereign immunity

31. See *id.* (expunction "no substantive relief," also "comparatively mild request"); *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1248 (E.D. Va. 1974), *aff'd*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977) (enjoining government publication of reports was neither costly nor disruptive). Note that minimizing the cost of relief may not even be necessary if the effect of relief is labeled cessation of conduct, rather than affirmative action, for *Larson* purposes. For use of this dodge, see *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1123 (8th Cir. 1973).

The Ninth Circuit led the way in exploiting the *de minimis* exception. That court purported to expand it into a full-blown equitable discretion approach comparable to the judicial balancing on other equity issues. In *Washington v. Udall*, 417 F.2d 1310 (9th Cir. 1969), the Ninth Circuit permitted suit over allocation of water resources, treating the United States as a mere stakeholder. *Larson* was interpreted as making the sovereign immune only if "the relief sought would work an intolerable burden on governmental functions, outweighing any consideration of public harm." *Id.* at 1318. *Accord*, *Saine v. Hospital Auth.*, 502 F.2d 1033, 1037 (5th Cir. 1974). The *de minimis* exception generally suggests at a minimum the need for a balancing of harms; this "intolerable burden" standard goes still farther, however, assigning reduced weight to claims of government harm.

Subsequent cases suggest that the test was more hospitable to relief in its articulation than in its application. On the hospitable side, recoupment of overpaid Social Security benefits was enjoined where "at most, the payments would amount to \$92,500.00." *Martinez v. Marshall*, 573 F.2d 555, 560 (9th Cir. 1977) (ignoring then-new section 702). *But see De Lao v. Califano*, 560 F.2d 1384 (9th Cir. 1977) (also ignoring section 702). The court in *De Lao* ruled without discussion that "ordering the payment of retroactive [Supplemental Security Income] benefits from the federal treasury would 'work an intolerable burden' on the government." *Id.* at 1391. The result in *De Lao* suggests that the *Washington v. Udall* formula was not to be taken literally. Despite both its articulated "intolerable burden" test and the larger balancing requirement, the Ninth Circuit in *De Lao* was unwilling to engage in thoroughgoing comparison of costs to the government with benefits to the plaintiffs and the public. The formula's function was principally to expand the concept of *de minimis* far enough to permit a remedy where the amounts at stake were large in the absolute sense but minimal in relation to the relevant budget.

32. Two other exceptions to sovereign immunity exploited during this period permitted relief (a) where a clear duty was violated or (b) where a fund separate from the general treasury could be tapped.

a. The duty exception.

Some pre-amendment cases found it permissible to order payment from federal funds, or to order relief which would cost money, where an agent or agency of the government violated a statutory duty. See, e.g., *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045 (D.C. Cir. 1971). As a prime example, an executive-legislative confrontation in the early 1970s led to an expansive reading of duties imposed by appropriation statutes. The mandamus power of the courts was held to extend to ordering federal agencies to disgorge monies administratively "impounded" despite congressional orders to spend. See, e.g., *New York v. Ruckelshaus*, 358 F. Supp. 669 (D.D.C. 1973) (sovereign immunity conceded inapplicable on appeal on other grounds), *aff'd*, 494 F.2d 1033, 1038-39 (D.C. Cir. 1974), *aff'd*, 420 U.S. 35 (1975). See also *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) (mandamus to compel retroactive salary increase; sovereign immunity ignored).

The courts did not respond uniformly to the question of how clear is clear enough to permit mandamus relief. Some courts cheated a nickel's worth on the "clear duty" requirement. For example, in *Kelley v. Metropolitan County Bd. of Educ.*, 372 F. Supp. 528 (M.D. Tenn. 1973), the court asserted mandamus jurisdiction to require federal expenditures by virtue of an alleged constitutional duty to spend to combat discrimination. Most other courts adopted a test that denied mandamus relief if any ambiguity clouded the defendant's asserted duty. See, e.g., *Carter v. Seamans*, 411 F.2d 767 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970).

The duty exception was thus no more than a small chink in the government's sovereign immunity armor.

b. The separate fund exception.

Occasionally courts have found sovereign immunity inapplicable even though payment will come from a government agency, if the source of payment is a fund independent of the Treasury. The principle has found several applications, from the narrow to the expansive. At its narrowest, it has been held (in the context of the eleventh amendment immunity of the states) that an unemployment compensation insurance fund financed by private premiums and federal contributions is not immune even though disbursements are controlled by state government officials. *Brown v. Porcher*, 660 F.2d 1001, 1006-07 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983). More broadly, an agency's administration of funds "severed from Treasury funds and Treasury control" was cited in support of a generous interpretation of an agency's

issue as well as *Larson*.³³ By adhering to pre-*Larson* officer suit precedents, they were able to award affirmative relief.³⁴ In the same vein, the Supreme Court discovered in the Administrative Procedure Act (APA) a presumption of reviewability of agency action, supporting any appropriate nondamage remedy, including injunctions and declaratory judgments.³⁵ The Court's opinion omits guidance, however, as to the limits, if any, which sovereign immunity may impose upon such relief.³⁶ Nowhere does the Court mention *Larson*; yet its plain thrust is inconsistent with footnote 11 in two ways. First, its silence as to immunity erodes *Larson*'s limitations on relief in government claims litigation; second, it ignores the *Larson* restriction that the defendant must act ultra vires³⁷ before the plaintiff may qualify for relief.

These softening influences, however, neither robbed *Larson* of its vitality nor prevented criticism of that decision. Critics focused on two continuing problems. (1) Because of *Larson*'s imprecise "may fail" language and more importantly, because of its conflict with the long and unignorable history of nonstatutory review and of statutory review without explicit waiver of immunity, *Larson* led to inconsistent results.³⁸ (2) To the extent sovereign immunity precludes a remedy, the government may violate individual rights with impunity.³⁹ These problems provoked an academic consensus in support of partial abolition of sovereign immunity.⁴⁰

B. Amended Section 702

In 1969, the Administrative Conference of the United States formally proposed amending 5 U.S.C. § 702, an APA judicial review provision, to scuttle the sovereign immunity defense as to relief other than money damages.⁴¹ Dean Cramton advanced

statutory exposure to "sue and be sued." *FHA v. Burr*, 309 U.S. 242, 250 (1940). Finally, the existence of a separate fund has been used to support the argument for mandamus as an exception to sovereign immunity in cases where Congress has also appropriated monies to an agency for a given year for a given purpose. *Springdale Convalescent Center v. Mathews*, 545 F.2d 943, 950-51 (5th Cir. 1977) (ignoring section 702).

This magical mystery tour of judicial exceptions confirms that the creativity of the federal courts made the limits of sovereign immunity even more erratic by 1976 than they had been in 1969 when the Administrative Conference pushed for uniformity.

33. See, e.g., *Udall v. Tallman*, 380 U.S. 1 (1965).

34. Scalia, *Sovereign Immunity*, *supra* note 14, at 872-83.

35. *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136 (1967).

36. In applying *Abbott Laboratories*, the lower courts were sharply divided on the issue whether the APA, as it then read, was a waiver of sovereign immunity. Compare *Penn v. Schlesinger*, 490 F.2d 700 (5th Cir. 1974), *rev'd on other grounds*, 497 F.2d 970 (5th Cir. 1974) (sovereign immunity bar) with *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971) (no bar), *on remand*, 369 F. Supp. 411 (D.C. Md. 1974).

37. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90 (1949), *reh'g denied*, 338 U.S. 240 (1949). See also *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) (expounding on the ultra vires definition in context of the state's eleventh amendment immunity). The distinction between conduct merely unlawful and that beyond the officer's authority has never been free from criticism and controversy. See, e.g., Shapiro, *Wrong Turns*, *supra* note 10, at 74-75. The Supreme Court, however, adhered to the latter standard to define ultra vires from *Larson* to the adoption of section 702. See *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962).

38. See, e.g., cases cited in Cramton, *Nonstatutory Review*, *supra* note 14, at 422-23.

39. Currie, *The Federal Courts and the American Law Institute, Part II*, 36 U. CHI. L. REV. 268, 291 (1969).

40. Cramton, *Nonstatutory Review*, *supra* note 14, at 418-19.

41. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 1969 Report, at 40-41 (Recommendation No. 9), *reprinted in* 1 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, at 23-24. See also McGowan, *The Administrative Conference: Guardian and Guide of the Regulatory Process*, 3 GEO. WASH. L. REV. 67, 73 (1985).

the same proposal in a 1970 article,⁴² and finally, six years later, Congress ratified the Administrative Conference's work.⁴³ The legislative history suggests that Congress' goals, like those of the statute's drafters, were to rationalize judicial decisions on government liability and to promote government accountability.⁴⁴

In permitting nondamage relief, Congress rejected both *Larson* and the various theories that have been advanced to justify sovereign immunity. First, Congress made plain its rejection of a government above the law. Governmental accountability is a purpose explicit in the legislative history.⁴⁵

Second, citizens are no longer required to absorb the costs of government error. A reckoning is called for despite its costs for the United States. Section 702 overrules *Larson's* seeming reservation of sovereign immunity against burdensome relief and makes irrelevant the post-*Larson* attempt to sort the burdensome from the inconsequential.⁴⁶ The committee reports explicitly discount the burden imposed by new relief possibilities. After doubting that section 702 would increase government costs greatly, the legislative history boldly proclaims the worth of any additional expense incurred.⁴⁷ The committee reports carefully disavow the notion that increased judicial review under section 702 "will create undue interference with administrative action."⁴⁸

Finally, the courts are the appropriate forum for redress. The committee reports laud judicial review, antidemocratic though it may be, as an important and necessary safeguard⁴⁹ against errors and excesses in the democratically-elected branches. Section 702 expands judicial review as it contracts sovereign immunity. The statute makes unnecessary the officer suit fiction because it makes the United States a proper defendant in all suits challenging government action and seeking nondamage relief.

More subtly, Congress did more than reject sovereign immunity. The thrust of the statute and its legislative history is to reject all sweeping limitations on judicial authority to award nondamage redress, emphasizing instead the suitability of relief in each case.⁵⁰ In effect, section 702 ratified the approach (if not the test) chosen by those courts that had struggled to allow nonstatutory judicial review for the deserving. Appropriateness of relief became the key.⁵¹

42. Cramton, *Nonstatutory Review*, *supra* note 14.

43. Pub. L. No. 94-574, 90 Stat. 272 (1976) (codified as amended at 5 U.S.C. § 702 (1982)).

44. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6130; S. Rep. No. 94-996 at 9. There was no conference report on S. 800, the bill that amended section 702. Because the committee reports are virtually identical, all citations hereinafter are to the House version alone.

45. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6130.

46. *See supra* notes 26-27. *But see* *McCartin v. Norton*, 674 F.2d 1317, 1322 (9th Cir. 1982) (sovereign immunity may remain a barrier, depending upon the intrusiveness of relief). *McCartin* is criticized roundly in 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 23:19, at 196 (2d ed. 1983).

47. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6130. Congress' hope for litigation savings may have been in vain. In the author's experience, the United States Attorneys raise virtually the whole panoply of potential procedural defenses to any marginally complex nondamage action.

48. *Id.* at 6129.

49. *Id.* at 6125.

50. Recall the statute simultaneously abolished companion barriers to judicial review. *See supra* note 4.

51. The House Report sees the basic issue as "the availability or scope of judicial review," H.R. Rep. No. 1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6129, and lists a variety of restraints on that review more discriminating than sovereign immunity. *Id.* at 6132.

III. CATEGORICAL INTERPRETATIONS OF SECTION 702 WAIVER

Bowen v. Massachusetts follows in an unfortunate tradition of misreading the availability of suit under section 702.⁵² In fact, *Bowen* exemplifies the principal errors. Too many cases are decided by reference to definitions (often erroneous definitions) rather than by careful attention to congressional intent.

A. Nondamage Relief Equivalent to Damages

Despite the language of section 702, its waiver of sovereign immunity as to all relief other than money damages has been limited by a series of artificial constructions. Several courts have denied nondamage relief which they construed as equivalent to damages.⁵³ The damage-equivalence approach is actually two conceptual approaches. One line of thinking equates nondamage relief to damages for purposes of preserving sovereign immunity;⁵⁴ another relies upon the equation to find nondamage relief impliedly forbidden by the availability of damages.⁵⁵ The Supreme Court in *Bowen* deserves credit for rejecting the first of these readings explicitly, and the second by implication.

1. Continued Sovereign Immunity

Some courts started from the undeniable proposition that section 702 omits to waive sovereign immunity as to damage actions, and concluded that no waiver attached to any relief that looks, smells, or feels like damages. The approach is simplistic, understandable, and erroneous. Nondamage decrees on occasion do call for the payment of money from the government to a claimant.⁵⁶ On the surface, such nondamage relief appears equivalent to damages and exclusion from section 702's waiver therefore appears appropriate. In *Jaffee v. United States*,⁵⁷ for example, the plaintiff sought an injunction requiring payments for her future medical care as a

52. For example, the Second Circuit somehow reasoned that Congress could not have intended the sovereign immunity amendment to apply to actions brought under the general federal question jurisdiction, 28 U.S.C. § 1331 (1982), despite Congress' expansion of that very statute in the same bill. *Watson v. Blumenthal*, 586 F.2d 925, 932 (2d Cir. 1978). After the Second Circuit reached this conclusion, every other circuit to consider the question went the other way. *See, e.g.,* *Warin v. Director, Dep't of Treasury*, 672 F.2d 590, 592 (6th Cir. 1982); *Carpet, Linoleum & Resilient Tile Layers v. Brown*, 656 F.2d 564, 567 (10th Cir. 1981); *Jaffee v. United States*, 592 F.2d 712, 718-19 (3d Cir. 1979), *cert. denied*, 441 U.S. 961 (1979). Subsequently, the Second Circuit reversed itself. *B.K. Instrument, Inc. v. United States*, 715 F.2d 713 (2d Cir. 1983).

Another unwarranted limitation was exercised in *Travelers Indem. Co. v. United States*, 593 F. Supp. 625, 627-28 (N.D. Ga. 1984) (section 702 waiver applies only to cases brought under APA). *Travelers* had sought a declaratory judgment under 28 U.S.C. § 2201 (1982) that it did not owe the Veterans Administration for medical treatment of *Travelers'* insured. Nondamage relief should not be denied simply because the plaintiff chooses a non-APA vehicle for her suit. *See Lopez v. Heckler*, 725 F.2d 1489, 1510 (9th Cir. 1984), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984) (mandamus); 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23:19, at 195 (2d ed. 1983).

53. *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979), *cert. denied*, 441 U.S. 961 (1979); *Lee v. Blumenthal*, 588 F.2d 1281 (9th Cir. 1979).

54. *Jaffee v. United States*, 592 F.2d 712.

55. *Lee v. Blumenthal*, 588 F.2d 1281.

56. *See, e.g., Bakersfield City School Dist. v. Boyer*, 610 F.2d 621, 628 (9th Cir. 1979). If a decree requires money outlays for systemic change rather than payment to plaintiffs, there is no ground for equating relief to damages. *Cf. Milliken v. Bradley*, 433 U.S. 267 (1977) (approving relief, using the retroactive-prospective distinction currently in favor in eleventh amendment immunity decisions).

57. 592 F.2d 712 (3d Cir. 1979), *cert. denied*, 441 U.S. 961 (1979).

veteran's benefit.⁵⁸ The Fourth Circuit equated her request to damages⁵⁹ and denied relief based upon sovereign immunity grounds.⁶⁰

Despite the elegant simplicity of the *Jaffee* approach, it does not comport with the accepted definition of damages found in our common law and equitable proceedings. Not all money remedies are damages. Damages are money relief shaped by two criteria: (1) their purpose as compensation for loss or injury suffered; and (2) their enforcement by execution or garnishment.⁶¹ A remedy which differs as to one or both of these characteristics is not damages but rather a nondamage remedy.⁶² Courts commonly award money relief that differs from damages in either or both respects.⁶³ On its face, section 702 permits any relief differing from damages.

Sensibly, the *Bowen* majority agreed that the district courts may not redefine the relief sought against the government.⁶⁴ Henceforth, the courts must read section 702 as waiving immunity in any case where the plaintiff's pleading "seek[s] relief other than money damages."

2. Nondamage Remedies Precluded

The equation of nondamage remedies with damages more frequently has resulted in dismissal on a separate conceptual basis. Several courts have held that nondamage relief that approximates damages is precluded by the existence of the damage remedy in the FTCA or the Tucker Act.⁶⁵ This conclusion too is erroneous, even though some remedies permitted by the new statute are barred by other provisions in the Code.

Section 702 is our starting point. The amendment denies nondamage relief

58. *Id.* at 714.

59. *Id.* at 715.

60. *Id.* at 719. See also *New Mexico v. Regan*, 745 F.2d 1318, 1321 n.3 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); *Burgos v. Milton*, 709 F.2d 1, 2-3 (1st Cir. 1983) (alternative holding).

61. D. DOBBS REMEDIES §§ 1.3, at 10-11; 3.1, at 135 (1973).

62. See *id.* at § 4.1, at 224.

63. On the facts of *Jaffee*, the characterization as damages is suspect because of still a third defining characteristic of damage relief. Future periodic payments for medical care are not a normal damage recovery in tort. Tort reformers have suggested modifying damage rules to permit paying future costs on an "as needed" basis, as *Jaffee* requested. See, e.g., Note, *Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards*, 64 IOWA L. REV. 138 (1979). For now, however, such erratic future payments are not "damages." See *Frankel v. Heym*, 466 F.2d 1226 (3d Cir. 1972) ("money damages" language in FTCA permits only lump sum money judgments). The common law damages tradition assumes that a single award can account accurately (enough) for future uncertainty. This is to suggest not that the form of payment demanded alone should control the availability of section 702 relief, but only that the damage equation formula is unhelpful, and may even permit relief where its protagonists did not intend relief.

64. This result was not foreordained. A host of lower court decisions had found it proper to reconstrue requested nondamage relief as damage relief. See, e.g., collected cases in Justice Scalia's dissent in *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2743 (1988). The argument was strengthened by language inconsistent with the statute appearing once and only once in the legislative history. On one occasion, the committee reports spoke not of money damages, but rather of "[t]he explicit exclusion of monetary relief." H.R. Rep. No. 1656, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6131. Arguably, that language avoids the necessity to redefine the plaintiff's prayer as damages. It could be read to maintain the sovereign immunity ban as to the broader category of monetary relief. Although the issue is not free from doubt, the Court's rejection of this argument comports with the statutory language, its history, and the balance of the committee reports.

65. See cases compiled at *Graham v. Henegar*, 640 F.2d 732, 734 n.6 (5th Cir. 1981). Almost invariably, this theory is an alternative to, or is combined with, the intercourt preclusion theory based upon the special position of the Claims Court.

where "expressly or impliedly forbid[den]" by other statutes granting relief.⁶⁶ This provision's purpose is obviously to preserve the design of existing remedies by barring new or competing relief that Congress has disclaimed elsewhere. The courts that preclude all nondamage money relief find such an implied disclaimer in the mere existence of statutes providing for damage relief only.⁶⁷

This approach is consistent with a test suggested by the Justice Department in supporting passage of section 702. Assistant Attorney General (now Justice) Scalia⁶⁸ urged a broad preclusion approach:

Because existing statutes have been enacted against the backdrop of sovereign immunity, this will probably mean that in most if not all cases where statutory remedies already exist, these remedies will be exclusive.⁶⁹

The Justice Department's approach as applied to damage-equivalent relief, however, must be rejected. It depends upon one of two assumptions. One possible supposition is that an earlier Congress, in providing for damages but omitting nondamage remedies, was not only intentionally hiding behind the cloak of sovereign immunity, but also thereby expressing such strong antipathy to nondamage remedies that those damages should be considered barred even if a later Congress should waive sovereign immunity. A separate possible view is that Congress, in amending section 702, was allowing previous sovereign immunity bars to survive as preclusion barriers whenever damages were available, regardless of the preclusive intent or lack thereof expressed in other statutes.

Neither assumption is persuasive. Earlier Congresses did nothing to reject nondamage remedies in perpetuity when adopting the FTCA or the Tucker Act.⁷⁰ Moreover, the 1976 Congress was creating entirely new remedial possibilities in its amendment. It makes little sense to treat previous Congresses' silence on nondamage issues as an absolute bar given Congress' new welcoming attitude toward alternative relief. Only if previous statutes permitting damages had tackled the issue of nondamage remedies discriminatingly, signaling their rejection of all, or approving some and omitting others, would it make sense to preclude those not authorized.⁷¹

Congress ultimately and wisely rejected the Justice Department's proffered test. The committee reports suggest that the statute withdraws power to grant section 702 relief only "when Congress has dealt in particularity with a claim" and made the given relief exclusive.⁷² As applied both to the FTCA and the Tucker Act, this test

66. Committee mark-ups at one point had amended the Administrative Conference proposal to make only money damages statutes preclusive of section 702 relief and to eliminate the words "expressly or impliedly." The original was reinstated after Justice Department opposition. H. R. Rep. No. 1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6144, 6146-47.

67. *See, e.g., Lee v. Blumenthal*, 588 F.2d 1281 (9th Cir. 1979).

68. Justice Scalia wrote the dissent in *Bowen v. Massachusetts*. *See Bowen v. Massachusetts*, 108 S. Ct. 2722, 2742-51 (1988).

69. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6144, 6147.

70. *See infra* notes 105-34 and accompanying text.

71. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-87 (1983), *on remand*, 705 F.2d 775 (5th Cir. 1983); *Brown v. General Servs. Admin.*, 425 U.S. 820, 832-33 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975). *But see Bush v. Lucas*, 462 U.S. 367, 388-90 (1983).

72. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6133.

yields the conclusion that nondamage monetary relief is not precluded across the board.⁷³ Prior to 1976, Congress never made discriminating choices among remedies in either statute; substantially the only relief addressed by either was damages.⁷⁴

The Supreme Court's opinion in *Bowen* does not discuss the preclusion-by-equivalence approach. The majority, however, contemplates the possibility of money relief in the district courts despite the abstract availability of Tucker Act damages.⁷⁵ The Court apparently has rejected both halves of the equivalence test that courts have used to bar section 702 relief.

B. How to Define and How Not to Define Damages

Bowen creates immense potential problems for lower courts because of the Court's overkill in defining "relief other than damages." The Court invites confusion by offering no fewer than three distinctions between damages and the relief Massachusetts sought:

(1) The state sought a declaratory judgment and injunction, neither of which is damages;⁷⁶

(2) Enforcing a statutory requirement does not give rise to an action in damages;⁷⁷ and

(3) Massachusetts' claim was for specific relief in restitution, rather than compensatory damage relief.⁷⁸

The Court should have quit with the first distinction. Both declaratory and injunctive remedies are in personam decrees. Therefore, since they do not direct payment subject to enforcement by the sheriff, they are not damages.⁷⁹ Section 702 makes its waiver a function of the plaintiff's claims; any action seeking nondamage relief is permitted. Future courts need not look beyond the prayer for declaratory or injunctive relief. Both are "relief other than money damages."

The Court opened a can of worms with its apparent suggestion that Massachusetts' relief was not damages because the underlying claim was for enforcement of a statute. Statutory claims are not inconsistent with damage relief. Government breaches of statutory requirements are actionable under the Tucker Act.⁸⁰ The usual relief granted in Tucker Act claims is damages.⁸¹ Statutory claims do not a nondamages action make.

The Court attempts to avoid this conclusion by noting that courts can award

73. Cf. *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1088-89 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987), which relied on not a private damage remedy alone but also a provision for injunctive suits by the Attorney General to discern Congressional rejection of a private injunctive remedy.

74. In those few instances where the Tucker Act provides other or broader relief than just damages, the argument for ousting section 702 relief is commensurately stronger.

75. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2736-39 (1988). As an alternative holding, the Court also suggests that Massachusetts had no substantive claim for Tucker Act damages. *Id.* at 2738 n.42.

76. *Id.* at 2731-32.

77. *Id.* at 2735. The Court's language is mildly ambiguous. See *infra* note 99.

78. *Id.* at 2732-33.

79. See *id.* at 2744 (Scalia, J., dissenting). See *supra* text accompanying notes 61-63.

80. 28 U.S.C. § 1346(a)(2) (1982) (district courts); 28 U.S.C. § 1491 (1982) (Claims Court).

81. See, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530, 557 (1962).

nondamages relief (like ordering in-kind benefits) when a claimant seeks statutory vindication. Such relief would not be damages. It follows, says the Court, that an order directing a monetary adjustment in a grant-in-aid,⁸² rather than in-kind benefits, should not be considered damages.⁸³

The Court's conclusion does not follow from its premise. Damages do not become something else simply because the courts *might* order alternative relief. Damages are defined not by what might be, but rather by their compensatory purpose and enforcement by writ.⁸⁴ In short, statutory relief is not by definition nondamage relief simply because nondamage relief is available. The same could be said about nearly any sort of claim.

Finally, "and more importantly,"⁸⁵ the Court holds that the state's requested relief is not damages because the requested relief constitutes restitution. The Court's conclusion merits scrutiny for two important reasons. First, its reasoning is wide of the mark, and thus may mislead lower courts. Second, because restitution is not damage relief yet shares important characteristics with damages, the question of when section 702 permits restitution brings us close to sorting out the statute's meaning and intent.

Massachusetts did not seek restitution in *Bowen*, despite the Court's holding to the contrary. The state sought an order that the United States had wrongfully withheld payment advances in a federal grant-in-aid program.⁸⁶ Restitution does not include the state's requested relief.

Monetary restitution is a nondamage form of relief, even though measured in money, because it does not purport to compensate claimants.⁸⁷ Instead, the purpose of restitution is explicitly to prevent unjust enrichment of the defendant.⁸⁸ Restitution often will restore to the plaintiff money or other property of which the plaintiff has been deprived, thereby making the plaintiff whole.⁸⁹ A claim for restitution does not depend upon a showing of any loss by the plaintiff, however.⁹⁰ Because restitution serves a separate purpose apart from compensation, it was recognized as a separate remedy for centuries before section 702 was amended.⁹¹ The distinction is so familiar to students of remedies that Congress must be understood to have recognized and adopted it in 1976, waiving sovereign immunity as to restitution claims.

82. Massachusetts claimed reimbursement of the federal matching share of Medical Assistance (Medicaid) benefits. This program uses a complex funding arrangement under which the United States advances periodic payments to the states. If state expenditures are disallowed for failure to meet federal requirements, the federal agency may reduce the next advance accordingly. Massachusetts sought to reverse such a partial withholding. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2726-29 (1988).

83. The Court borrows not only the analysis but also the language of Judge Bork, in *Maryland Dep't of Human Resources v. Department of HHS*, 763 F.2d 1441, 1446 (D.C. Cir. 1985). *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2732-33.

84. See *supra* text accompanying notes 61-63.

85. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2731.

86. For more detailed facts, see *supra* note 82.

87. *Moses v. MacFerlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760).

88. See, e.g., *Campbell v. Tennessee Valley Auth.*, 421 F.2d 293 (5th Cir. 1969).

89. See, e.g., *Moses v. MacFerlan*, 2 Burr. 1005, 97 Eng. Rep. 676.

90. *Olwell v. Nye & Nissen Co.*, 26 Wash. 2d 282, 173 P.2d 652 (1947); *Edwards v. Lee's Admin.*, 265 Ky. 418, 96 S.W.2d 1028 (1936).

91. *Moses v. MacFerlan*, 2 Burr. 1005, 97 Eng. Rep. 676.

To this point, the Supreme Court was on the right track. It went awry, however, in holding that restitution was an available remedy for simple withholding of funds. The word "restitution" comes from the same root as "restore."⁹²

Monetary restitution claims are broken down into two types. Restitution may be specific, calling for the return of identified or "specific" property, including money obtained by the defendant; or it may be substitutionary, awarding money against a defendant to prevent unjust enrichment but not to require reconveyance of identified property to the plaintiff.⁹³ Monetary restitution occasionally is specific, but more often is substitutionary relief.⁹⁴

Massachusetts clearly did not seek specific restitution in *Bowen*. The state did not claim that any of its identified money had fallen into the hands of the United States.⁹⁵ The state made no better claim for substitutionary restitution. Although the precise contours of restitution relief are in flux,⁹⁶ restitution is not a substitute for a damages action on a debt. Substitutionary restitution is available only where a "benefit" has been conferred upon the defendant.⁹⁷ This term of art does not include simple unilateral withholding of money owed.⁹⁸ The federal government's refusal to pay matching funds allegedly owed to Massachusetts, therefore, did not give rise to a restitution claim.⁹⁹

Although the Supreme Court incorrectly determined that Massachusetts' claim was akin to restitution, future cases may arise where claimants state claims sounding in restitution against the government. Thus, based upon *Bowen*, future restitution cases are no longer barred by sovereign immunity. We will return to the questions whether the district courts may and should entertain such claims after we have explored the limitations on relief contained within section 702.

92. D. DOBBS, REMEDIES § 4.1, at 222 (1973).

93. *Id.* at § 4.4, at 256 (1973). The most familiar form of substitutionary restitution is the implied-in-law contract. See, e.g., *Moses v. MacFerlan*, 2 Burr. 1005, 97 Eng. Rep. 676.

94. D. DOBBS, REMEDIES § 4.4, at 259 (1973).

95. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2745 n.3 (1988) (Scalia, J., dissenting); cf. *Edelman v. Jordan*, 415 U.S. 651, 668-69 (1974).

96. 1 G. PALMER, THE LAW OF RESTITUTION 2-6 (1978).

97. D. DOBBS, REMEDIES § 4.1, at 224 (1973).

98. [R]estitution . . . is based on . . . benefit to [the] defendant. . . . Sometimes this is done by restoring to plaintiff the very thing that defendant unlawfully acquired from him, or some other thing that defendant acquired with plaintiff's thing, together with any profits defendant earned with plaintiff's thing. Sometimes it is done by requiring defendant to pay for benefits he received from plaintiff.

D. LAYCOCK, MODERN AMERICAN REMEDIES 462 (1985). The Court's analysis is not aided by the use of the word "restitution" in the Medicaid statute to describe administrative monetary adjustments. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2731. "Restitution" is often used to describe phenomena other than civil judicial remedies, the most frequent example being victim restitution requirements as part of criminal sentencing.

99. At one point, the Court distinguishes Massachusetts' action from "a suit seeking money in compensation for the damage sustained by the failure . . . to pay." *Bowen v. Massachusetts* 108 S. Ct. 2722, 2735 (emphasis in original). Although the distinction is somewhat ambiguous (for the more likely reading, see *supra* text accompanying notes 80-84), it is at least possible that the Supreme Court found significance in the fact that Massachusetts sought no special damages. This observation is no help to its argument, however. Massachusetts sought general damages for the withholding, a different sort of damages but damages nonetheless. See D. DOBBS, REMEDIES § 3.2, at 138 (1973).

IV. CATEGORICAL PRECLUSION

Section 702 creates still another potential trap that was neither presented nor considered in *Bowen*.¹⁰⁰ Despite the statute's rejection of sovereign immunity as an absolute barrier to relief other than damages, the amendment leaves regrettable room for equally conclusive barriers. This analysis starts from the statutory proviso prohibiting relief where "any other statute that grants consent to suit expressly or impliedly forbids" it. Focusing not upon the relief sought but rather upon the substance of the claim advanced, some observers have found nondamage remedies precluded by the Tucker Act damages remedy.¹⁰¹ This preclusion approach forecloses any remedy but damages, even if the relief requested is not money and even though it does not equate to damages.

Government contracts and takings of property are the principal doubtful subject matters. Advocates for such a claim-specific approach to preclusion include original proponents of section 702's amendment,¹⁰² the Congress which adopted it,¹⁰³ and subsequent courts.¹⁰⁴ Despite this near-unanimity of opinion, this section will argue that no mere provision of damages for a given claim precludes nondamage relief for the same substantive violation.

Dean Cramton, when urging amendment of section 702, started the implied preclusion ball rolling¹⁰⁵ by arguing that Tucker Act damages stood in the way of specific performance at the instance of a disgruntled government contractor.¹⁰⁶ Cramton's interpretation has remained the prevailing position.¹⁰⁷ The committees contemplating the amendment to section 702 quoted the Cramton view on specific performance verbatim,¹⁰⁸ but without attribution. Subsequent decisions have extended the preclusive effect of Tucker Act damages even further, to include not simply specific performance, but all nondamage remedies in contract. In *North Side Lumber Co. v. Block*,¹⁰⁹ for example, the Ninth Circuit held that the Tucker Act precluded a declaratory judgment request seeking to void a contract obligation to harvest timber on government lands.¹¹⁰ Other courts have rejected the applicability of section 702 in contract actions with the same vigor as the Ninth Circuit.¹¹¹

The Tucker Act, however, does not preclude nondamage relief in contract

100. *But see Bowen v. Massachusetts*, 108 S. Ct. 2722, 2745-46 (dictum in dissenting opinion). The dissent reads the majority as overruling the cases discussed here. That result would be welcome, but in fact the majority did not address the preclusion proviso, nor its effect upon any section 702 claims.

101. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

102. Cramton, *Nonstatutory Review*, *supra* note 14, at 435.

103. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6131.

104. *See, e.g., Burgos v. Milton*, 709 F.2d 1, 3 (1st Cir. 1983).

105. Cramton's argument was foreshadowed, however, by a handful of pre-1976 lower court cases ousting district court equitable relief in contract cases brought under the APA because of the damage remedy available in the Claims Court. *See, e.g., International Eng'g Co. v. Richardson*, 512 F.2d 573, 577-81 (D.C. Cir. 1975), *cert. denied sub. nom. International Eng'g Co. v. Rumsfeld*, 423 U.S. 1048 (1976).

106. Cramton, *Nonstatutory Review*, *supra* note 14, at 435.

107. *But see, e.g., CURRIE, FEDERAL JURISDICTION IN A NUTSHELL* 176 (2d ed. 1981), calling "surprising" the conclusion that specific performance is impliedly precluded.

108. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6133.

109. 753 F.2d 1482 (9th Cir. 1985), *cert. denied*, 474 U.S. 931 (1985).

110. *Id.* at 1483.

111. *See, e.g., Burgos v. Milton*, 709 F.2d 1, 3 (1st Cir. 1983).

actions. Cramton cites only one supporting decision for his assertion¹¹² yet that decision does not support the argument he originated. The case that Cramton cited, *United States v. Jones*,¹¹³ did indeed consider the effect of the Tucker Act upon remedies in contract, but its reasoning is irrelevant to the implied preclusion issue. *Jones*, over two dissents, interpreted the word "claim" in the Tucker Act as contemplating relief in damages only. Discovering no provision in the statute for nondamage relief, and language that would be meaningless as applied to nondamage remedies, the Court held specific performance not affirmatively provided for by the Tucker Act.¹¹⁴

Jones' reasoning does not support Cramton's or the legislative history's analysis. *Jones* found specific performance unavailable because specific performance was omitted from the Tucker Act. It did not hold, because the issue was not before the Court, that the Tucker Act impliedly precluded nondamage remedies made available by other statutes.

Other leading Supreme Court decisions are similarly unhelpful on the implied preclusion issue. *Goldberg v. Daniels*¹¹⁵ found specific performance barred by sovereign immunity. The Court did not refer to the immunity doctrine by name since the United States was not a defendant in this officer suit. The Court made clear, however, that the federal government was both an indispensable party to the litigation and protected by immunity should the plaintiff attempt to sue it.¹¹⁶ Most importantly, *Goldberg* was decided without any discussion of the Tucker Act, thus without interpreting the Act's preclusive effect upon other remedies.

The Court's analysis in *Wells v. Roper*¹¹⁷ was marginally different. Like *Goldberg*, *Wells* rested upon the failure to sue the United States. Unlike *Goldberg*, *Wells* alluded to the Claims Court remedy, but only for a limited purpose. The Court recited that the Tucker Act did not waive the government's immunity against specific performance.¹¹⁸

Taken together, the major pre-1976 cases stand for the following limited propositions: (a) sovereign immunity precluded specific performance prior to amendment of section 702; and (b) the Tucker Act by its own force does not provide for specific performance. The argument for implied preclusion of nondamage remedies thus depends upon a negative inference from the existence of a Tucker Act damage provision. This argumentative leap, however, depends upon the Justice Department assumption¹¹⁹ that where Congress has provided one remedy, the former sovereign immunity bar as to others should survive section 702 as an implied preclusion bar to the same relief. This rule of survival makes no more sense when applied to the type of claim advanced (no specific performance in contract) than it did

112. Cramton, *Nonstatutory Review*, *supra* note 14, at 435 n.216.

113. 131 U.S. 1 (1889).

114. *Id.* at 16-19.

115. 231 U.S. 218 (1913).

116. *Id.* at 221-22. The indispensable party barrier too was removed by the 1976 amendment to section 702.

117. 246 U.S. 335 (1918).

118. *Id.* at 338 (using language of absence of consent elsewhere than in the Claims Court).

119. See *supra* note 77 and accompanying text.

when based on the type of relief sought (no nondamage relief where money is claimed). The mischief of this approach increases as the ban upon specific performance expands to take in all nondamage contract remedies.

The error of this approach would still be minimal if it infected nondamage relief only in contract. The infection, however, strikes deeper. Cramton lists,¹²⁰ and the 1976 committee reports echo,¹²¹ statutes other than the Tucker Act that are argued to be preclusive of section 702 relief. Some of these statutes contain language expressly precluding specific relief.¹²² Others, like the Tucker Act, provide less than all potential remedies without indicating that the omissions were deliberate.¹²³ The latter statutes should not be construed as being impliedly preclusive without some further expression of intent to forbid nondamage remedies.¹²⁴

Finally, recent Supreme Court dicta imply that the Justice Department's preclusion approach is applicable to yet another substantive claim. The Court in *Ruckelshaus v. Monsanto Co.*¹²⁵ recently denied equitable relief against a taking of property, citing *Larson* for the proposition that such relief is barred where a monetary claim may be brought.¹²⁶ Significantly, the Court omitted escape hatches in earlier similar opinions that noted the damage remedy, yet admitted the availability of

120. Cramton, *Nonstatutory Review*, *supra* note 14, at 435 & nn.217-21 (1970).

121. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6133-34 (omitting some of Cramton's examples).

122. In this category are statutes ordinarily precluding relief against tax collections except in the context of a suit for refund. 26 U.S.C. § 7421 (1982); 28 U.S.C. § 2201 (1982).

123. The statutes listed by Cramton restrict unnamed remedies, only in the sense of defining exclusive avenues of judicial review. They assign cases as among the federal courts. To the Claims Court go certain patent and copyright claims, 28 U.S.C. § 1498 (1982 & Supp. 1988); also claims for liquidated damages withheld from certain contractors, 28 U.S.C. § 1499 (1982); and certain native American damage claims, 28 U.S.C. § 1505 (1982). To the district courts go native American allotment claims, 28 U.S.C. §§ 2341-51 (1982). To selected courts go assorted other designated judicial review proceedings, 28 U.S.C. §§ 2341-51 (1982).

Apart from their assignment function, these statutes frequently speak of relief. They do so, however, only in the sense of permissiveness rather than exclusiveness. All of the Claims Court authorizations listed, for example, provide for damages alone. Prior to 1976, that remedy would have been exclusive because of the outstanding sovereign immunity bar to nondamage relief. On the face of those statutes, however, nothing suggests an intent to preclude alternative relief now permitted by section 702.

Amazingly, Cramton undercuts his argument for freely implying preclusion in his apparent desire to have his cake and eat it too. Conceding as he must that the Tucker Act provides a compensation remedy for federal takings of property, see *infra* note 126, Cramton nonetheless urges that prior restraints on unlawful takings are not precluded by that remedy and he further expresses the hope that section 702 will be seen as overruling *Malone v. Bowdoin*, 369 U.S. 643 (1962), a post-*Larson* decision barring prior restraint on sovereign immunity grounds. Cramton, *Nonstatutory Review*, *supra* note 14, at 436. Cramton's argument that compensation for takings is constitutionally based ultimately fails to distinguish takings from nonconstitutional claims. The analytical identity of these situations should lead, however, not to rejection of nondamage remedies in takings cases as Cramton feared, but to opening up section 702 relief regardless of the substance of the claim advanced.

124. See cases cited *supra* note 71.

125. 467 U.S. 986 (1984).

126. *Id.* at 1016. Money remedies for government takings have their own significant history in sovereign immunity and Tucker Act lore. The Supreme Court several times has rejected the argument that the Tucker Act leaves intact the sovereign immunity of the United States against compensation claims. See, e.g., *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126 (1974). The Supreme Court decisions start from the language of the fifth amendment to the Constitution, "nor shall private property be taken for public use, without just compensation." Recognizing the constitutional dimension of taking claims, the Court formerly found an enforceable implied contract for payment, despite its general rule that the Tucker Act does not waive sovereign immunity as to contracts implied in law. See, e.g., *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922); *United States v. Bethlehem Steel Co.*, 258 U.S. 321, 326 (1922). More recent decisions have avoided sovereign immunity without this restitutionary device by finding a constitutional guarantee of compensation in the takings clause, concurrently actionable under the Tucker Act. See, e.g., *United States v. Causby*, 328 U.S. 256, 267 (1946).

restraint against takings.¹²⁷ Read literally, *Monsanto* would foreclose injunctions against unauthorized takings in favor of post-seizure damages alone, without any discussion of the appropriateness of one remedy or the other.¹²⁸

To bar nondamage relief on the basis of *Larson* would be perverse indeed following the amendment to section 702 with its explicit acknowledgement of nondamage remedies.¹²⁹ Although there may be good reason to bar injunctions against government condemnations,¹³⁰ those reasons are no longer found in the sovereign immunity approach of *Larson*, which section 702 overrules.¹³¹ Nor are they found in the comparably sweeping implied preclusion approach that *Monsanto* embraces. Congress has given no hint in the Tucker Act that it prefers damage remedies to the extent of excluding nondamage restraints absolutely. If such remedies are to be declared beyond the pale, because of their disruption of government operations, for example, then that issue should be confronted squarely and forthrightly.

Ultimately, the expansive approach to preclusion in the foregoing examples is of concern because it threatens all nondamage remedies not provided expressly by the United States Code. The same analysis which suggests that specific performance is precluded in contract actions also must conclude that injunctions are precluded in suits founded upon statute or regulation, which yield identical damage remedies. The Tucker Act treats all three claims *in pari materia*, permitting damages in suits "founded either upon . . . any Act of Congress, or any regulation of an executive department, or upon any . . . contract."¹³² If mere omission from the Act forbids nondamage remedies in contract, then surely it would preclude them as to statutory

127. The Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), had recognized that damages may be either unavailable or inadequate in a given case, justifying equitable relief. *Id.* at 127 n.16 (citing previous cases authorizing such relief). See also *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 71 n.15 (1978).

128. Previous cases have suggested two separate possible bases for finding damages to be inadequate compensation: (1) if the taking is unauthorized, damages may be simply unavailable against the government, *Hooe v. United States*, 218 U.S. 322, 336 (1910); see also *Sun Oil v. United States*, 572 F.2d 786, 819 (Ct. Cl. 1978); H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM, Note on the Remedial Aspects of the Steel Case*, 1397, 1402-06 (2d ed. 1973); or (2) damages may be so speculative or otherwise so immeasurable that the damage remedy is inherently inadequate. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). In either case, injunctive relief should be available to restrain a taking for which the owner cannot obtain effective recompense. *Id.* Injunctive relief appears peculiarly appropriate in the case of unauthorized seizures. But see *Southern Cal. Fin. Corp. v. United States*, 634 F.2d 521, 526 n.8 (Ct. Cl. 1980), *cert. denied*, 451 U.S. 937 (1981). Cases involving a government agent acting upon her own hook rather than under a cloak of legitimate authority prompted the officer suit exception to allow constraint on such extramural activities. Perhaps the Supreme Court will be prodded to face this relief issue squarely, given its recent interest in takings remedies. Cf. *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987).

129. Despite the implications of *Monsanto*, section 702 should make available injunctive relief against takings. No other statute permitting relief (nor in this instance any prior Supreme Court decision approving damages) makes money damages exclusive of equity. Section 702 is uniformly expansive of remedies as to all substances.

130. Little or nothing about takings claims suggests a need for a special shield against injunctions. Indeed, the constitutional status of takings compensation suggests special solicitude for victims, encouraging an expansive view toward alternative relief. From the government's point of view, on the other hand, the incursion threatened by judicial prohibition of takings can hardly be greater than the hardship suffered from shutdown of an entire government program by injunction, as section 702 now permits. Cf. *Curry v. Block*, 738 F.2d 1556 (11th Cir. 1984) (suspension of farm mortgage foreclosures).

131. Cramton, *Nonstatutory Review*, *supra* note 14, at 436 argues that section 702 also would overrule *Malone v. Bowdoin*, 369 U.S. 643 (1962), a post-*Larson* Supreme Court decision holding that sovereign immunity barred specific relief against takings.

132. 28 U.S.C. § 1346(a)(2) (1982) (district courts); 28 U.S.C. § 1491 (1982) (Claims Court).

and regulatory claims as well.¹³³ Yet such a result would gut the 1976 amendment. In every case that might command Tucker Act, FTCA, or any other damages relief, this approach reinserts the implied preclusion prohibition for the bar of sovereign immunity that section 702 strips out.¹³⁴ This could not be the result Congress intended.

None of this is to say that the Tucker Act is never an implied preclusion of section 702 relief, but only that omissions from that Act alone do not forbid nondamage relief. Section 702 relief should be barred where it would interfere with congressional policy as implied in other statutes, whether under section 702's preclusion proviso or under more general preclusion notions.¹³⁵ In *Jaffee v. United States*,¹³⁶ for example, plaintiff sought an injunction requiring payment of future veterans' benefits for health care.¹³⁷ A damages action for her same injuries would have been unavailable under the so-called *Feres*¹³⁸ doctrine, barring FTCA suits involving conduct incident to service in the military.¹³⁹ The Fourth Circuit found dismissal appropriate without relying directly upon *Feres*, instead calling relief equivalent to damages and therefore barred by sovereign immunity.¹⁴⁰ The reasons for the *Feres* doctrine, if they are at all significant,¹⁴¹ are forceful enough to apply to any action involving the armed forces even outside the context of FTCA damages where the doctrine arose.¹⁴² *Jaffee* should have been dismissed as precluded, rather than as equivalent to damages.¹⁴³

133. *North Side Lumber Co. v. Block*, 474 U.S. 931 (1985) (White, J., dissenting from denial of certiorari); *B. K. Instrument, Inc. v. United States*, 715 F.2d 713, 726-27 (2d Cir. 1983).

134. Congress has either granted or denied a damages remedy for nearly every government wrong. See, e.g., the FTCA's incorporation of local tort law, 28 U.S.C. § 2674 (1982); and its long list of exemptions from tort duties, 28 U.S.C. § 2680 (1982 & Supp. 1988). If any congressional advertence to damages is deemed sufficient to preclude alternative relief, then section 702 is virtually an empty shell.

135. See also the preclusion clause in 5 U.S.C. § 701(a) (1982), explicitly noted in the legislative history as a continuing limitation upon relief. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6131.

136. 592 F.2d 712 (3d Cir. 1979), cert. denied, 441 U.S. 961 (1979).

137. *Id.* at 714.

138. *Feres v. United States*, 340 U.S. 135, 146 (1950).

139. In subsequent cases, the Court has articulated the primary rationale of *Feres* as preserving military discipline unfettered by judicial second-guessing. *United States v. Muniz*, 374 U.S. 150, 162 (1963). It is thus a doctrine of special deference to the discretion of military authorities.

140. *Jaffee v. United States*, 592 F.2d 712, 719 (3d Cir. 1979).

141. The *Feres* court conceded that nothing in the FTCA nor in Congress' deliberations supported a military exception. *Feres v. United States*, 340 U.S. 135, 138 (1950). A recent extension of *Feres* drew a sharp dissent from four justices who argued that the original *Feres* doctrine was inconsistent with the statute and unsupported by convincing policy. *United States v. Johnson*, 107 S. Ct. 2063 (1987), on remand, 828 F.2d 671 (11th Cir. 1987).

142. *United States v. Stanley*, 107 S. Ct. 3054 (1987), on remand, 828 F.2d 1498 (11th Cir. 1987); *Chappell v. Wallace*, 462 U.S. 296 (1983). Neither decision arose from an FTCA claim against the United States, yet both applied the rationales of *Feres* to bar damage claims against individual defendants. Cf. *Rostker v. Goldberg*, 453 U.S. 57, 64-69 (1981); *Gilligan v. Morgan*, 413 U.S. 1, 10-11 (1973), on the needs of military discipline as affecting permissible nondamage relief.

Disallowance of damages does not mean automatic preclusion of nondamage relief. Not all policies justifying denial of damages apply with equal force to nondamage remedies. The judicial immunity against damages in 42 U.S.C. § 1983 actions, for example, does not preclude awarding injunctive relief against a judge. *Pulliam v. Allen*, 466 U.S. 522 (1984). The goal of preserving independent decision-making may be threatened less by prospective restraint than by second-guess damage awards. *Id.* at 536-38. See also Cramton, *Nonstatutory Review*, *supra* note 14, at 436 (FTCA damages exclusion for intentional torts would not preclude injunction under section 702).

143. Relief in *Jaffee* and cases like it may be barred for still another reason. Section 702 creates no new substantive claims; a cause of action must be found elsewhere. *Hill v. United States*, 571 F.2d 1098 (9th Cir. 1978). The only

Litigants have also sought to use section 702 to plug remedial gaps in existing statutes. Brief experience with the 1976 amendment shows the preclusion proviso is even more important in controlling such remedial requests than in limiting permissible substantive claims.

Congress can preclude remedies by either an affirmative statement of intent or such comprehensiveness of remedy that omission by oversight is unlikely.¹⁴⁴ This test has been tried out on section 702 and found eminently workable by those courts willing to use it in lieu of sweeping preclusion approaches. For example, the Supreme Court found section 702 relief barred where a separate all-embracing nondamage statute (the Quiet Title Act) omitted plaintiff's requested remedy.¹⁴⁵ On the other hand, the Ninth Circuit found the McCarran Act (governing water rights) not preclusive because its relative sketchiness suggested Congress' less than comprehensive treatment of remedies.¹⁴⁶ As these examples suggest, a will-of-Congress test¹⁴⁷ is a workable check upon section 702 relief.¹⁴⁸

In short, implied preclusion analysis should be used surgically rather than to dispose of claims categorically.

V. APPROPRIATE NONCATEGORICAL LIMITS ON NONDAMAGE RELIEF: ADEQUATE REMEDY

The pockets of resistance outlined throughout this Article are so elastic that they threaten to swallow up the entire fabric of section 702. By and large, however, the courts have followed Congress' lead to greater remedial choice in government claims litigation. Section 702 has been a salutary development in promoting citizen relief and greater government accountability.¹⁴⁹ On the other hand, the resistance to the

argument to the contrary is that the amendment is phrased as a permission to sue, rather than as a waiver of sovereign immunity. Since 1976, the Supreme Court wisely has confirmed that the language of permission to sue is the language of waiver of sovereign immunity, and does not dispense with the separate claim-of-right requirement. *United States v. Mitchell*, 463 U.S. 206, 216-27 (1983) (construing Tucker Act's permission for suit).

144. See cases cited *supra* note 71.

145. *Block v. North Dakota*, 461 U.S. 273 (1983) (divining the preclusive effect of 28 U.S.C. § 2410 (1982)).

146. *South Delta Water Agency v. Department of the Interior*, 767 F.2d 531, 541-43 (9th Cir. 1985).

147. The phrases "will of Congress" and "statutory intent" as used herein are not intended to signal a choosing of sides in the debate now raging over the proper judicial approach to statutory interpretation. See Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214-16 (1983). The approach urged here should be a comfortable common ground among interpreters of the legislative will. The approach entails using those indicia available for divining Congress' intentions rather than presuming preclusion from its silence.

148. Courts have properly refused, for example, to find exclusive of other relief the damage remedy provided disgruntled bidders on government contracts. *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 846 n.9 (D.C. Cir. 1982). Despite the obvious monkey wrench-in-the-works effect of halting government procurements, courts have used equitable balancing to determine the propriety of relief in any given case. The disappointed bidder bore a heavy burden, needless to say, *id.*, but was not precluded absolutely from seeking a district court injunction. Note the subtle shift in the issue since the recent amendment of 28 U.S.C. § 1491 to allow nondamage relief in the Claims Court. See *infra* note 175. The present issue is not whether equitable relief is available, but rather whether the district court is ousted of all power by the Claims Court's new authority to afford complete relief.

149. It is confessedly impossible to say for a certainty that section 702 has changed the outcome of any particular case because of the variety of immunity avoidance devices available before 1976. See *supra* notes 31-36 and accompanying text. Two items evidence dramatic change, however. First, the prior off-the-wall dismissals by judges unsophisticated in the intricacies of sovereign immunity have virtually disappeared. Cf. Cramton, *Nonstatutory Review*, *supra* note 14, at 421. Moreover, courts interpreting the provisions of section 702 lead one to believe that section 702 makes all the difference. See, e.g., *Warin v. Director, Dep't of the Treasury*, 672 F.2d 590 (6th Cir. 1982) (district court sovereign immunity dismissal reversed, based solely upon section 702); *Carpet, Linoleum and Resilient Tile Layers v.*

amendment is to be taken seriously despite the artificiality of the constraints imposed upon relief.

Congress was well aware of the need to rein in section 702 relief. Even though it should have expected the courts to impose traditional limits on their new powers, Congress still chose to state those restraints explicitly. The amendment indicates that relief is barred where explicitly or implicitly forbidden by other statutes granting relief. It also preserves existing grounds for denying judicial review of administrative action,¹⁵⁰ including, for example, the mootness and standing hurdles for establishing justiciability¹⁵¹ and the unreviewability of discretionary action.¹⁵² Applied honestly, these provisos are a sufficient tether upon the judiciary to avoid the need for most of the artificial constraints chronicled in the previous section.

One fear as yet remains for our discussion, however, namely that the special role of the Claims Court as arbiter of most Tucker Act claims (usually for damages) will be undercut by allowing nondamage relief in the district courts. Section 702 creates a system of redress that parallels and may compete with an established forum for judicial review. Section 702 is an expansion of the powers of the district courts. Tucker Act cases are ordinarily entrusted to the Claims Court.¹⁵³

The potential competition is important because Congress and the courts have recognized a leading role for the Claims Court in claims covered by the Tucker Act. Congress, for example, while granting the district courts concurrent jurisdiction over damage claims for up to \$10,000, has made the Claims Court's jurisdiction exclusive

Brown, 656 F.2d 564 (10th Cir. 1981) (again reverses; mandamus action; Tenth Circuit had not adopted duty exception before 1976, *see supra* note 32); Sheehan v. Army and Air Force Exch. Serv., 619 F.2d 1132 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728 (1982) (court treats applicability of section 702 as determinative on sovereign immunity). The utility of section 702 is a happy rejoinder to J. STEADMAN, D. SCHWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT § 16,108, at 331 (2d ed. 1983). The authors examined the various provisos with which section 702 was hedged and concluded: "It is almost as if the statute is directed at the words and not the content of sovereign immunity." *Id.*

150. These grounds include, but are not limited to, the following: (1) extraordinary relief should not be granted because of the hardship to the defendant or to the public ("balancing the equities") or because the plaintiff has an adequate remedy at law; (2) action committed to agency discretion; (3) express or implied preclusion of judicial review; (4) standing; (5) ripeness; (6) failure to exhaust administrative remedies; and (7) an exclusive alternative remedy.

H.R. Rep. No. 1656, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6132.

151. *See, e.g.,* Los Angeles v. Lyons, 461 U.S. 95 (1983).

152. *Compare* Heckler v. Chaney, 470 U.S. 821 (1985), with Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), *on remand*, 335 F. Supp. 873 (W.D. Tenn. 1972). Thus, limits on liability are no longer to be determined by sovereign immunity as a first defense. Instead, the plaintiff may encounter a second breastwork labelled "preclusion." If no other statute "precludes" the suit, the government must fall back upon a third line of defense, namely, the whole range of other government claims defenses including those special to agency review and those unique to equity. These doctrines retreat from the universal to the fact specific. Where any preliminary barrier is relaxed, judicial review restraints will be relaxed, at least to the extent of requiring consideration of more subtle, fact specific barriers that previously would have been irrelevant.

153. The intercourt tension is most acute in cases where district court relief requires a determination on the merits which would be claim preclusive in the Claims Court, such as simultaneous actions for damages in the Claims Court and for section 702 relief in the district courts. *See, e.g.,* Giordano v. Roudebush, 617 F.2d 511, 514-15 (8th Cir. 1980). A test allocating cases between these courts is needed even absent a pending suit in the Claims Court. The potential for a damage claim in that court, however, may be so obvious, perhaps even so palpably a part of the plaintiff's litigation strategy, that the district court, when presented with solely nondamage claims, must consider the potential for undercutting the Claims Court. *See, e.g.,* Rowe v. United States, 633 F.2d 799, 801-02 (9th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981). Finally, even if no Claims Court action is ever brought, the reason may be that the district court effectively will have determined the substantive rights between the parties, making Claims Court litigation superfluous. *See, e.g.,* Minnesota v. Heckler, 718 F.2d 852 (8th Cir. 1983).

above that amount.¹⁵⁴ In addition, some Tucker Act claims are entrusted exclusively to the Claims Court regardless of amount,¹⁵⁵ and the Tucker Act now grants certain nondamage powers to the Claims Court alone.¹⁵⁶

Some courts have extrapolated from the Tucker Act a general principle of Claims Court exclusivity. Those courts have viewed the Claims Court's role as primary, not only in the universe of Tucker Act damage claims, but also as to non-Tucker Act claims for which relief could be provided pursuant to that Act. Some courts have gone so far as to suggest that the Claims Court has exclusive jurisdiction over substantive claims within its jurisdiction, either generally,¹⁵⁷ or as to contract claims specifically.¹⁵⁸ Such decisions extend the Claims Court's position as sole dispenser of Tucker Act relief into exclusive position as to all relief. This mindset is consistent with the general aim not to allow the section 702 waiver to subvert the Tucker Act scheme,¹⁵⁹ as expressed by both pre-1976 proponents of the amendment¹⁶⁰ and the legislative committees.¹⁶¹ The exact reasons for the strong preference for Claims Court adjudication are seldom articulated. When the preference is articulated, however, it is forcefully asserted. Apparently the justifications for exalting the Claims Court are the natural advantages of a court that is both specialized

154. Compare 28 U.S.C. § 1346(a)(2) (1982) (district courts) with 28 U.S.C. § 1491 (1982) (Claims Court).

155. 28 U.S.C. § 1346(a)(2) (1982). The district courts' jurisdiction over damages claims up to \$10,000 in contract actions was abolished by the Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (1978) (codified as amended at 28 U.S.C. § 1346(a)(2) (1982); 28 U.S.C. § 1491 (1982)).

156. Absent special authorization, the Tucker Act authorizes both the district courts and the Claims Court to grant only money relief. *Richardson v. Morris*, 409 U.S. 464 (1973); *United States v. King*, 395 U.S. 1, 4 (1969). The Act now includes special authority to dispense nonmoney relief in two common situations. A 1972 amendment to 28 U.S.C. § 1491 permits the Claims Court to award defined nondamage relief, principally in employee suits for back pay. Such remedies include reinstatement and restoration of benefits. Remand Act, Pub. L. No. 92-415, 86 Stat. 652 (1972); *McKamey v. United States*, 201 Ct. Cl. 898 (1973). A 1982 amendment allows nondamage relief in certain contract bid claims. Pub. L. No. 97-164, 96 Stat. 39 (1982). Strikingly but not surprisingly, the district and appellate courts had granted specific relief in exactly these two types of cases, despite the general bar of sovereign immunity, even before 1976. *Service v. Dulles*, 354 U.S. 363 (1957) (employee nondamage relief; no sovereign immunity treatment); *Scanwell Labs, Inc. v. Schaffer*, 424 F.2d 859 (D.C. Cir. 1970) (sovereign immunity in contract bid protests waived by former section 702). But see *International Eng'g Co. v. Richardson*, 512 F.2d 573, 580 (D.C. Cir. 1975), cert. denied, 423 U.S. 1048 (1976). The same pressures that earlier induced effective district court remedies have now generated identical legislatively sanctioned remedies in the Claims Court. See *infra* note 175.

Congress could obviously rationalize the entire system of government claims by entrusting all Tucker Act claims to the district courts, or by giving them all to the Claims Court together with full nondamage powers. It has not chosen to do either. Congress has taken some lesser steps to make sense of the Tucker Act relationship between the Claims Court and the district courts. All Tucker Act appeals now go to the Court of Appeals for the Federal Circuit, 28 U.S.C. § 1295(a)(2) (1982), permitting doctrinal reconciliation without Supreme Court intervention. Mutual transfers between district courts on the one hand and the Claims Court on the other, to correct jurisdictional filing errors, are now permitted. 28 U.S.C. § 1631 (1982). Congress has missed golden opportunities to impose additional rationality. See, for example, the attempt to raise from \$10,000 to \$50,000 the damage ceiling on cases in which the district courts share concurrent jurisdiction with the Claims Court. S. 946, 90th Cong., 1st Sess., 113 CONG. REC. 3241 (1967) (passed Senate only). A more sweeping proposal would have made the Claims Court's remedial powers coextensive with those of the district courts in cases otherwise within the Claims Court's jurisdiction. Comment, *Equitable Relief in the United States Court of Claims Under Public Law 92-415*, 23 AM. U.L. REV. 465, 469-71 (1973). Neither described proposal passed the House of Representatives. *Id.*

157. *Graham v. Henegar*, 640 F.2d 732, 734-35 (5th Cir. 1981).

158. *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967 (D.C. Cir. 1982).

159. See, e.g., *Graham v. Henegar*, 640 F.2d 732, 734 (5th Cir. 1981). But see *Rowe v. United States*, 633 F.2d 799, 802 (9th Cir. 1980), cert. denied, 451 U.S. 970 (1981).

160. Byse, *Proposed Reforms*, *supra* note 14, at 1525.

161. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 1621, 1631.

and centralized: consistency¹⁶² developed by close communication among a few judges, expertise developed from consistent exposure to similar issues, expedited handling, and freedom from distracting generalist issues.¹⁶³

We can now appreciate the foremost motivation behind the blunderbuss rules refusing nondamage relief under section 702. Those opinions frequently trumpet the Claims Court and lament its wounds should district court nondamage authority be read broadly.¹⁶⁴

Without ever letting on what it was doing, the Supreme Court apparently swept away all of these cases in a *Bowen* footnote.¹⁶⁵ The Court held that the Claims "Court's jurisdiction is 'exclusive' only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court." Most notably, this dictum would consign to history the cases denying district court jurisdiction over government contract claims despite "sue and be sued" immunity waivers in agency authorizing legislation.¹⁶⁶ Although the Court does not spell out its reasoning, it seems eminently sensible that the Claims Court cannot possess exclusive jurisdiction when the district court is also empowered.¹⁶⁷

The Claims Court exclusivity approach, as applied to section 702 claims, looks much like the aggressive preclusion approach discussed above, differing most importantly in that its central concern is not foreclosing alternative remedies but preserving an existing forum. The exclusivity approach suffers from the same defects as the aggressive preclusion tests. It assumes a preclusive intent Congress has never expressed and it would bar all section 702 relief where Tucker Act claims are available, except in those cases where the plaintiff can plead or chooses to plead only damages of \$10,000 or less and therefore is in a district court. Such a minimal role for section 702 is surely inconsistent with the wholesale expansion of remedies contemplated by Congress in 1976.

162. See the recent assignment to the Court of Appeals for the Federal Circuit of all Tucker Act appeals, whether from the district courts or from the Claims Court. Pub. L. No. 97-164, 96 Stat. 37 (1982); 28 U.S.C. § 1295(a)(2) (1982). Consistency was an express goal of the consolidated appeal route. S. Rep. No. 275, 97th Cong., 1st Sess. 5-6 (1982).

163. See, e.g., *B. K. Instrument, Inc. v. United States*, 715 F.2d 713, 725 (2d Cir. 1983).

164. See, e.g., *Graham v. Hencgar*, 640 F.2d 732, 735 n.6 (5th Cir. 1981) (quoting *Warner v. Cox*, 487 F.2d 1301, 1305-06 (5th Cir. 1974)).

165. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2740-41 n.48 (1988).

166. See, e.g., *Portsmouth Redevelopment & Housing Auth. v. Pierce*, 706 F.2d 471, 474 (4th Cir. 1983), cert. denied, 464 U.S. 960 (1983); *United States v. Adams*, 634 F.2d 1261, 1266 (10th Cir. 1980); see also *Massachusetts v. Departmental Grant Appeals Bd.*, 815 F.2d 778, 785 (1st Cir. 1987) (distinguishing section 702 relief as permissible).

167. The better view is that the Claims Court jurisdiction is exclusive only as to claims brought under the Tucker Act, but does not bar actions permitted under such separate waivers of immunity. *Pacificorp v. Federal Energy Regulatory Comm'n*, 795 F.2d 816, 826 (9th Cir. 1986) (Wallace, J., concurring in part); *Bor-Son Building Corp. v. Heller*, 572 F.2d 174, 182 n.14 (8th Cir. 1978). The issue once again is implied rather than express preclusion since nothing in the Tucker Act explicitly forecloses district courts from awarding contract or any other damages under other waiver statutes. Despite the volume of ink spent on the exclusivity issue, no court has yet pointed to any language in the Tucker Act or its legislative history to indicate such a preemptive intent, nor has the author found any. Some courts have imposed a sensible restriction on suits under competing statutes, however, construing their waiver to reach only monies severed from the Treasury for a given project or fiscal year's undertakings, thus keeping the Tucker Act remedy exclusive where recovery would be a general charge on the Treasury. See, e.g., *Selden Apts. v. HUD*, 785 F.2d 152, 156-57 (6th Cir. 1986); *S.S. Silverblatt, Inc. v. East Harlem Pilot Block*, 608 F.2d 28, 36 (2d Cir. 1979).

Making the Claims Court exclusive might be a sensible step for Congress to take as to contract or any other damage claims. After all, unlike section 702 relief, the damages offered in the district courts should be identical to those obtainable in the Claims Courts. Nevertheless, nothing in the Tucker Act suggests that the Claims Court has exclusive jurisdiction for contract claims.

The argument for exclusivity suffers if the Tucker Act generally is compared to a 1982 amendment to the Act granting the Claims Court exclusive jurisdiction over bid protest cases.¹⁶⁸ Legislative history to that amendment makes clear that Congress intended its language of exclusivity¹⁶⁹ to keep bid disputes out of the Boards of Contract Appeals jurisdiction, rather than to make the Claims Court the sole judicial forum.¹⁷⁰ Nevertheless, the amendment signals an important and necessary prerequisite for intercourt exclusivity: if the Claims Court is to do the job, it must be empowered to enter all appropriate nondamage relief. The 1982 bid protest provisions permit just that.¹⁷¹ The absence of comparable provisions for Claims Court nondamage relief elsewhere argues against comprehensive assignment of contract disputes to the Claims Court and in favor of section 702 power in the district courts.¹⁷²

The district courts offer strengths that make it sensible to deny the Claims Court exclusive jurisdiction over Tucker Act substance. Litigating in district court means a home forum for the plaintiff. Not only can the claimant save the costs of litigating in the Claims Court,¹⁷³ but he or she can gain a judge sensitive to local conditions. These advantages may overcome deterrents to prospective litigants who might otherwise forgo initiating claims.¹⁷⁴ Moreover, the Claims Court often lacks requisite remedial authority.¹⁷⁵ Finally, the district courts are more experienced in meting out

168. Pub. L. No. 97-164, 96 Stat. 25 § 133(a) (1982).

169. 41 U.S.C. § 607(d) (1982).

170. H.R. Rep. 312, 97th Cong., 1st Sess. 43-44 (1981).

171. 28 U.S.C. § 1491(a)(3) (1982), as added by Pub. L. No. 97-164, 96 Stat. 25 (1982).

172. *But see* Portsmouth Redevelopment & Housing Auth. v. Pierce, 706 F.2d 471, 474 (4th Cir.), *cert. denied*, 464 U.S. 960 (1983); American Science & Eng'g, Inc. v. Califano, 571 F.2d 58, 62 (1st Cir. 1978) (greater district powers irrelevant to Claims Court exclusivity).

173. Most lawyers must gear up to deal with an unfamiliar court and unfamiliar procedures, and any hearing is likely to be in a distant city, as the court's authorizing legislation backhandedly acknowledges. The court presently is authorized only sixteen judges, 28 U.S.C. § 171(a), who are cautioned to schedule sessions "with a view to securing reasonable opportunity to citizens to appear before the Claims Court with as little inconvenience and expense to citizens as is practicable." 28 U.S.C. § 173 (1982).

174. These arguments are reminiscent of the pressures that ultimately forced expansion of the federal mandamus jurisdiction from the District of Columbia court alone to all district courts across the country. Byse, *Proposed Reforms*, *supra* note 14, at 1495-96; 28 U.S.C. § 1391(e) (1982).

Decentralization of adjudicative power takes away by implication from the original stated justification for the Claims Court's exclusive jurisdiction in larger cases. "Upon full consideration by the committee it was thought where a claim exceeded \$10,000 it would be better and safer for the Government it should be where the head of the Department may be present to protect the Government." 18 CONG. REC. 624 (1887) (statement of Sen. Tucker). Today even the Claims Court sits outside Washington. *See supra* note 173.

175. The war between those favoring Claims Court exclusivity, and those supporting district court access, logically should be fought most acutely where Congress has granted arguably concurrent powers. *See supra* note 156. If Congress prefers Claims Court monopoly, then the existence of nondamage relief power in that court should preempt the section 702 authority of the district court. Yet on the two occasions Congress has authorized Claims Court nondamage relief, it has preempted the entire debate by preserving the same remedies in the district courts.

The first important nonmonetary relief permitted in the Claims Court was reinstatement and status adjustment in employee suits for back pay. Pub. L. No. 92-415, 86 Stat. 652 (1972), adding 42 U.S.C. § 1491(a)(2) (1982). The legislative history to that bill makes clear that the purpose of the amendment was ameliorative, to avoid duplicative proceedings; that the new relief authorized was considered collateral to monetary claims already in that court; and that the statute was not intended to enlarge the Claims Court's jurisdiction. H.R. Rep. No. 1023, 92nd Cong., 2d Sess. 2 (1972); S. Rep. No. 1066, 92d Cong., 2d Sess. 2, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3116. The congressional materials affirmatively recognize the district courts' nondamage remedial power without suggesting that the new statute abolishes that authority. *Melvin v. Laird*, 365 F. Supp. 511, 516-19 (E.D.N.Y. 1973).

On its next occasion to expand Claims Court authority beyond monetary relief, Congress was even more explicit in preserving competing, pre-existing relief in the district courts. The legislative history to a 1982 amendment granting the

nondamage relief. Therefore, district courts are more adept at dealing with the special issues posed by nondamage remedies, even where the Claims Court offers parallel remedies.

But if we allow the district courts' collective noses into the tent of Tucker Act substance, how then can we contain section 702 relief so as to preserve the preeminence of the Claims Court? To deny the Claims Court exclusive power over Tucker Act substance is not to deny that the Claims Court should take a leading role. The Administrative Procedure Act signals the primacy of the Claims Court twice. Section 704 allows APA review only "where there is no other adequate remedy in a court."¹⁷⁶ The Supreme Court in *Bowen* was unanimous in reading section 704 as an effective limit upon district court relief under section 702.¹⁷⁷

The same result should flow from section 702 itself. The first proviso to that section preserves existing limitations on relief, including the adequacy doctrine, the rule that a court of equity will not intervene if a court of law can provide adequate redress.¹⁷⁸ Applied here, this doctrine proscribes section 702 relief if a suitable damage remedy is available under the Tucker Act. This in turn means that the district courts should defer to the Claims Court where it has exclusive power to dispense damages when damages satisfy the plaintiff's needs.

The traditional approach to adequacy stops there. It ousts coercive relief only if the plaintiff has a suitable remedy at law. In this context, we should utilize a broader list of potentially adequate remedies: if the Claims Court can provide whatever remedy the plaintiff requests, (*e.g.*, injunctive relief), then the district court has no role to play. This expansive reading of adequacy is consistent with the evidence of congressional intent surrounding section 702. The legislative history of section 702 expresses a general goal of preserving the remedial structure of the Tucker Act, thereby preserving the jurisdiction of the Claims Court.¹⁷⁹ A full arsenal of relief in the Claims Court should oust the district courts.¹⁸⁰

The utility of the adequacy test, as a limit upon district court power, appears

Claims Court nondamage powers in pre-award contract bid protests, 29 U.S.C. § 1491(a)(3), acknowledges the travel problem inherent in Claims Court practice, and for that reason condones parallel district court powers. H.R. Rep. 312, 97th Cong., 1st Sess., at 43 (1981). See also *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1374-76 (Fed. Cir. 1983); but see *Alderete Gen. Contractors v. United States*, 715 F.2d 1476, 1480 n.4 (Fed. Cir. 1983) (hinting at post-award ouster of district court relief). For more on the intricacies created by the Claims Court's narrow power to grant nondamage remedies, see Day, *The Bid Protest Jurisdiction of the United States Claims Court: A Proposal for Resolving Ambiguities*, 15 PUB. CONT. L.J. 325 (1985).

In short, not only willing courts, but also the Congress seems to have defined broadly the jurisdiction of the district courts in order to preserve their responsiveness and other advantages, even in instances where the Claims Court appears to offer competitive relief.

176. 5 U.S.C. § 704 (1982).

177. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2736, 2741-42, 2746 (1988).

178. See Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065, 1071 (1979); Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 347 (1981).

179. Of course, Congress may express a contrary intent (to allow parallel remedies in the Claims Court and the district courts) in given legislation. See *supra* note 175.

180. Using the adequacy test as an assignment mechanism among courts is a relatively unfamiliar concept in our age of unified court systems, with jurisdiction both at law and in equity. Forging the adequacy doctrine to reflect comity concerns as between courts is consistent, however, with both its origins and some modern usage. Note, *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 997-98 (1965) (law courts versus chancery). Compare *Hicks v. Miranda*, 422 U.S. 332 (1975), with *Younger v. Harris*, 401 U.S. 37 (1971) (federalism).

clearly if we apply that test to the types of nondamage relief that some courts and commentators have seen as threatening to the Claims Court. The first type was any relief in the form of money. However, section 702 waiver ordinarily opens up only remedies that already call for application of the adequacy doctrine, namely those in personam remedies enforceable by contempt.¹⁸¹ More specifically, those remedies are the equitable forms of relief and the common law coercive writs. The equitable remedies clearly invoke the adequacy formula, and the common law writs are also preempted by a sufficient damage remedy.¹⁸²

Although it is familiar, the adequacy approach is also discriminating. Only in the rare money case in which the plaintiff needs the special advantages of alternative relief will money relief other than damages be appropriate. Finally, the adequacy formula reinforces the Claims Court's claim to first position in the Tucker Act scheme—but ignores it, sensibly, when the Tucker Act provides insufficient redress.¹⁸³

Similarly, the adequacy doctrine limits the scope of district court intervention in contract disputes, or taking claims, or any other type of substantive claim in which Claims Court preeminence is sought. Specific performance must be denied, for example, unless the plaintiff can show the potential damage remedy deficient for her unique needs. The same is true for any other contract remedy. No restraint on takings, as a further instance, may be granted unless the taking itself is unlawful or the judicially determined compensation is inherently inadequate.¹⁸⁴ The adequacy approach treats contracts and takings and all other Tucker Act substantive claims alike. Alternatives to damages should not be precluded absolutely, but rather denied except where damages are inadequate.¹⁸⁵

The problem is the Supreme Court backed off just as it was about to impose needed rationality on section 702 relief. Instead of making the adequacy inquiry turn on the facts of each individual case, the Court suggested a categorical inquiry by type

181. Restitution is an exception to this proposition. See *infra* note 210.

182. See, e.g., *Cartier v. Secretary of State*, 506 F.2d 191, 199–200 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 947 (1975). In general, the grant or denial of mandamus relief is guided by equitable principles. *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 359 (1933).

183. The adequacy test in and of itself does not affirmatively require nondamage relief where damage relief is inadequate. DOBBS, REMEDIES § 2.5, at 61 (1973). Rather, section 702 requires appropriate nondamage relief while the adequacy test defines appropriateness. The adequacy inquiry, unlike the sovereign immunity and preclusion quest, must be carried out on a case-by-case basis to accomplish its objective. *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 970 (D.C. Cir. 1982).

184. Few cases have found the potential compensation for a taking so inadequate as to justify a prior restraint, probably because the federal judges themselves ultimately control its measure. Although Congress may prescribe the "mode" of compensation, the courts ultimately must determine its sufficiency. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 149–51 (1974). See the rare debate between majority and dissenters over argued inherent inadequacy of damages to recompense U.S. military occupation of agricultural land in Honduras in *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated*, 471 U.S. 1113 (1985). The debate foreshadows just how rare pre-taking restraints are likely to be.

185. The adequacy talisman requires the unthinkable of some courts: they must accept the well pleaded prayer for nondamage relief of the complaint, entertaining it on its own terms. The requested relief may not be reconstrued as "equivalent to damages," but instead proof of inadequacy must be required if the Claims Court remedy is to oust district court relief. The well-pleaded complaint approach is not unthinkable in other contexts. Cf. *Mann v. Pierce*, 803 F.2d 1552, 1555 (11th Cir. 1986) (refuses to recast contract claim as unavailing tort action). A few courts have even followed it in section 702 cases. See, e.g., *Lee v. Blumenthal*, 588 F.2d 1281, 1282–83 (9th Cir. 1979) (alternative holding); cf. *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304 (1952).

of case.¹⁸⁶ Apparently the Claims Court damage remedy will be deemed inadequate as to the whole category unless it will always be an adequate substitute for prospective relief.¹⁸⁷ Further, because the need for nondamage relief may arise only late in litigation, the government must make a convincing showing of eternal adequacy to justify relegation to the Claims Court.¹⁸⁸ These twin presumptions, apparently making district court relief available if damages would be or become inadequate in any case of plaintiff's case type, render the adequacy requirement a virtual dead letter.

The Court went astray for two important reasons. First, it misapprehended the purpose of the statutory adequacy prerequisite, seeing it solely as a means of avoiding duplication of remedies.¹⁸⁹ Taken literally, the duplication approach would always allow district courts to enter any nondamage relief—which is not available in the Claims Court. The Court's adequacy discussion literally does not go so far, but in practice the adequacy requirement is nearly that diluted.

The adequacy requirement serves a much larger purpose than simply avoiding overlap with the Claims Court. It also serves to protect the superior role of the Claims Court in government claims litigation, as outlined above. Justice Scalia's dissent takes an apocalyptic view, fearing that "the Claims Court is out of business."¹⁹⁰ His vision need not materialize, if only the Court corrects its second mistake.

The Court chooses to read the adequate remedy doctrine contrary to tradition. Its categorical approach flies in the face of the usual rule that adequacy is a function of the individual facts of the case.¹⁹¹ One can sympathize with this break with the past. More than likely, the Court saw a bright-line rule as preferable to individualized inquiry because of the savings of judicial time and the difficulty of showing inadequacy in any given case.

Both supposed advantages are ephemeral, however. Most nondamage relief is extraordinary relief, in which case the plaintiff will have to show that damages would be inadequate. Furthermore, if the concern is having to make the adequacy determination "at the outset,"¹⁹² this problem too infects much injunctive litigation. In cases like *Bowen*, the plaintiff will claim that damages are inadequate because they will come too late to make a difference, given the speed of real-world events.¹⁹³ In such cases, claimants will often move for interim relief, which will require exactly the kind of threshold determination the majority tries to save the district courts.

A sensible individualized application of the adequacy requirement will avoid most of the fears here attributed to the Court. By and large, the courts now agree that an alternative remedy is inadequate unless it is equally "complete, practical and

186. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2738, 2739 n.43 (1988).

187. *Id.* at 2737–38.

188. *Id.* at 2738, n.43.

189. *Id.* at 2736–37.

190. *Id.* at 2745. This fear is a bold overstatement. Litigants content with damages and with the Claims Court should keep that forum alive. Unquestionably, however, the majority's decision dramatically and expressly encourages forum shopping. *Id.* at 2737.

191. *Id.* at 2749 (Scalia, J., dissenting).

192. *Id.* at 2739, n.43.

193. *Id.* at 2738 (focusing on state's need to plan).

efficient.”¹⁹⁴ A grant-in-aid recipient should be able to satisfy this standard, with little decisional strain on the court, by alleging and showing that its future program operations are jeopardized by threats of funding termination and that a damage action is too slow to resolve the uncertainty.¹⁹⁵

The mass-production approach to adequacy also breaches the congressional command, implicit in section 702, to focus upon the appropriateness of relief and its form in each case. Doctrines that unnecessarily create wholesale new opportunities for government claimants no more comport with that thrust than do doctrines like sovereign immunity or unrestrained implied preclusion, which bar litigation for whole categories of cases.

Bowen is not only misguided, but also lamentable for the golden opportunities it misses. Most obviously, the opinion in its detail wreaks such potential havoc with the Claims Court’s sphere that it is unlikely to withstand the test of time.¹⁹⁶ The principal structure of the opinion, in differentiating nondamage money relief from damages, and in making district court authority turn on the adequacy rule, is the best reading of the statute to accommodate the congressional design and competing interests. *Bowen*’s virtues should not be lost in the coming scramble over detail.

Bowen’s uncertain future may tempt the lower courts to use alternative assignment mechanisms as between the district courts and Claims Court. Several existing tests have been created for “mixed” cases like *Bowen*, in which a claimant seeks both reimbursement for past government errors and assurances that they will not happen again. *Bowen* should kill off all of them.

At least two alternative tests, however, may survive *Bowen*. They are the relative significance and the substance tests. Neither approach is workable.

A. The Relative Significance Test

The relative significance test purports to compare the importance of nondamage relief sought from the district court with that of money relief obtainable in the Claims Court to determine whether district court remedies should be precluded. The relative significance test in action seems to have a narrowly limited objective. It aims to prevent district court jurisdiction in case of demands for minor nondamage relief as contrasted to large potential damages.

The test by this name governs only two reported decisions, both from the same circuit. These two Eighth Circuit cases are so similar as to cry out for comparison and

194. *Terrace v. Thompson*, 263 U.S. 197, 214 (1923), as quoted and explained in Laycock, *Injunctions and the Irreparable Injury Rule*, 57 Tex. L. Rev. 1065, 1071 (1979). Justice Scalia in dissent appears to take an outmoded view of inadequacy, arguing that the requirement is met only if the plaintiff fits one of the traditional categories of cases where damages were deemed inadequate, such as multiple litigation. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2748. Justice Scalia, for some inexplicable reason, is willing to open up extraordinary declaratory relief as to new grant-in-aid programs, but not as to ongoing programs. *Id.*

195. The majority cites precisely these planning concerns in support of its categorical inadequacy approach. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2738. But such dislocations should not be assumed across the board. A given state may choose to drop its affected program, for example. In that case, its only claim would be for reimbursement, and damages would be adequate relief. If the declaration of rights inherent in the award or denial of damages would suffice to resolve future concerns, moreover, section 702 relief would be inappropriate. *Id.* at 2749 (Scalia, J., dissenting).

196. *Id.* at 2746 (Scalia, J., dissenting).

contrast. In *Sellers v. Brown*,¹⁹⁷ the plaintiff sought a declaration of her entitlement to \$16,000 and to future veterans' benefits for health care. The court dismissed the suit without prejudice, finding the claim for retroactive relief predominant and entrusting the action to the Claims Court.¹⁹⁸

The same circuit approved of district court remedial power in *Minnesota v. Heckler*,¹⁹⁹ a strikingly similar suit. Minnesota sought reimbursement of the federal share of state Medical Assistance (Medicaid) payments to health care providers and declaratory relief as to future federal cost-sharing liability. Noting that up to \$10,000,000 in accrued costs and untold amounts of future grant-in-aid funding were at issue, the court concluded that the declaratory judgment was "the primary relief sought."²⁰⁰

The relative significance test, however, is ultimately unworkable. To compare accrued harms (damages) against future harms (subject to nondamage relief) is to compare apples and oranges. The amount of future losses is subject to multiple contingencies. Even if we can estimate with some certainty the magnitude of likely future losses, we still need an appropriate ratio for comparing those to losses already suffered in order to define those cases that may be retained in the district court for the awarding of nondamage relief. The balancing formula yields no such ratio, nor is it possible to develop a workable universal coefficient.

Most importantly, the relative importance test in action appears not to meet its own stated goal. Ostensibly designed to protect the Claims Court jurisdiction against raiding, the test nonetheless permits Minnesota to bring a multimillion dollar claim in the district court. The test works in only one sense: it gives the deciding court virtually free rein to decide whether to keep the case before it.²⁰¹

197. 633 F.2d 106 (8th Cir. 1980).

198. *Id.* at 108.

199. 718 F.2d 852 (8th Cir. 1983).

200. *Id.* at 859.

201. The *Minnesota* panel seems also to have reformulated and refined the relative significance test even as it purported to follow *Sellers*. The new version, a two-part formula, makes district court relief available wherever nondamage relief "has significant prospective effect or considerable value apart from merely determining monetary liability." *Minnesota v. Heckler*, 718 F.2d 852, 858 (8th Cir. 1983) (emphasis added). The second part of this formula tips explicitly toward the plaintiff's choice by examining not the abstract comparison between damage and nondamage remedies, but rather the incremental value of nondamages over damage relief. It may even be intended to suggest the adequacy test. The first portion, in distinguishing prospective from retrospective relief, is potentially confusing and unnecessary. It invokes the same troublesome cutoff point used by the Supreme Court to distinguish relief barred by eleventh amendment immunity from that not barred. *Edelman v. Jordan*, 415 U.S. 651 (1974), *reh'g denied*, 416 U.S. 1000 (1974). The *Edelman* demarcation has at least the virtue of a bright, definable line to reduce friction in a sensitive area of federal-state relations. The same line has no virtue as an assignment mechanism among federal courts for cases against the federal government. It errs on both sides of rationality. First, district courts have no monopoly on prospective relief, even where the Claims Court awards only damages. Claim preclusion principles create prospective effect and thereby may make district court nondamage relief unnecessary. On the other hand, accrued (as opposed to prospective) monetary liability is not inherently inconsistent with a remedy other than damages if continued deprivation works special hardship. *National Juvenile Law Center, Inc. v. Regnery*, 564 F. Supp. 1320, 1328 (D.D.C. 1983), *rev'd on other grounds*, 738 F.2d 455 (D.C. Cir. 1984) ("plaintiffs here do not seek money damages but injunctive relief [to compel continued federal funding]"). The key to availability of section 702 relief is not a given remedy's forward-looking perspective, but rather its practical unavailability elsewhere.

Several courts have articulated still a third version of "relative significance," namely the "primary relief" test. *See, e.g., Portsmouth Redevelopment & Housing Auth. v. Pierce*, 706 F.2d 471, 474 (4th Cir. 1983), *cert. denied*, 464 U.S. 960 (1983); *American Science & Eng'g, Inc. v. Califano*, 571 F.2d 58, 62 (1st Cir. 1978) (alternative holding). In practice this formula appears weighted toward Claims Court exclusivity because the courts applying it often expressly

B. The Substance Test

This test makes assignment of cases turn upon the nature of the claim advanced and is capable of undue expansion as well as undue contraction of district court power to award relief. Once again, the problem is myopic attention to issues of competing jurisdiction rather than appropriateness of competing remedies. The principal battleground over section 702's substantive application has been in contract disputes.

Several district and circuit courts have rebelled against the idea that any claim that involves a government contract is by definition beyond their nondamage authority. The principal device by which they have exerted remedial authority is to define a claim as other than in contract. Thus several courts have held that claims of violations of statutes relating to contract awards are not Tucker Act contract disputes.²⁰² The plaintiffs are held to be suing to enforce statutory bidding directives, for example, rather than terms of their contract.²⁰³

Taking a cue from such decisions, a leading commentator has suggested that a narrow definition of contract claims for purposes of the Tucker Act best reserves section 702 relief to deserving plaintiffs.²⁰⁴ A recent decision of the District of Columbia Court of Appeals exploits this approach with a vengeance. Judge Bork's opinion in *Maryland Department of Human Resources v. Department of Health and Human Services*²⁰⁵ amply demonstrates the seductive quality of the contract-noncontract dichotomy in assignment of cases. The decision goes to great lengths—nearly four pages—to show that the state could assert a Tucker Act claim as a matter neither of contract nor of statute so that no Claims Court potential in the case competed with section 702 relief.²⁰⁶ The court's symptomatic error in this regard,²⁰⁷ and more importantly, its overall preoccupation with jurisdiction, blinded it to the crucial issue whether the plaintiff had an adequate remedy in the Claims Court should it prevail on the merits.²⁰⁸

discount the Claims Court's inability to grant complete relief. *Id.* The test is thus weighted in the opposite direction from the relative significance test as used in the Eighth Circuit, while providing equally little guidance as to its applicability to a given case.

202. See, e.g., *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967–70 (D.C. Cir. 1982); cf. *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1485–86 (9th Cir.), cert. denied, 474 U.S. 931, (1985).

203. Notably, one district court recently expanded relief in such a bid protest case to require the government's temporary adherence to a prior contract between plaintiff and the government—from one perspective, the very specific performance forbidden by Cramton's pioneering view of preclusion in contract cases. *Universal Shipping Co. v. United States*, 652 F. Supp. 668 (D.D.C. 1987).

204. C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 4101, at 210–11 (2d ed. 1985).

205. 763 F.2d 1441 (D.C. Cir. 1985).

206. *Id.* at 1450–53.

207. The *Maryland* court's error lay in concluding that a grant-in-aid agreement is not a contract for purposes of the Tucker Act simply because it is governed by statutes and regulations. *Id.* at 1449. The court's analysis is ultimately flawed because there is no inconsistency between contract and governing regulation. If contract and regulation were inconsistent, hardly any government agreement would qualify as a "contract." See 41 U.S.C. § 1 *et seq.* (1982) and implementing regulations. Although some aspects of federal largesse are difficult to square with contract notions, the grant process contemplates offer, acceptance, and consideration on both sides. Such agreements are contracts at least for purposes of the Tucker Act. *Massachusetts v. Departmental Grant Appeals Bd.*, 815 F.2d 778, 786 (1st Cir. 1987).

208. All of this should allay, at least by comparison, any possible fears that the inadequacy test is so fact-specific as to provoke an extra round of litigation over a new issue and so open-ended as to invite overreaching by the district courts. The contract-noncontract distinction and the various comparison tests, are all similarly fluid and peril-laden, yet they do not come to grips with the reasons for assigning cases to one court or the other. A purposeful test requires the district courts to look honestly at their role, allowing scrutiny by the courts of appeals of the factors that count, even if

As this example shows, the substantive approach to allocation between courts is hardly more satisfying than the remedy characterization and balancing tests. In fact, in most cases, characterization of the substance of the claim should be irrelevant. Claims Court relief will be available regardless of whether the claim sounds in contract or asserts violations of statutory, regulatory, or constitutional provisions.²⁰⁹

The district and appeals courts' opinions are textbook examples of how not to resolve the issue of whether the Tucker Act preempts section 702 remedies in the district courts. None of these approaches define any stopping point short of district court intervention once that court is found empowered to act. The substance test grants the district court jurisdiction once the dispute is defined out of the realm of contract, for example. The relative significance approach relies not on definition but upon comparison, yet with no basis for meaningful comparison, so that the test itself becomes empty.

The *Bowen* approach to adequacy shares the all-or-nothing quality of these tests and some small measure of their potential for manipulation. The Court should declare individualized adequacy the only inquiry relevant to the appropriateness of section 702 relief.

VI. THE DIFFICULT CASE: RESTITUTION

Restitution relief is a special problem in the assignment of cases. Restitution is problematic because traditionally, it may be granted without a showing that damage remedies are inadequate.²¹⁰

Furthermore, as a factual matter, the Tucker Act permits some restitution claims but not others.²¹¹ This raises the question whether omission from the Tucker Act should preclude section 702 restitution. Where the Claims Court does afford restitutionary remedies, it appears appropriate to apply the adequacy doctrine to deny section 702 relief, as *Bowen* and this Article suggest, even though that doctrine does not ordinarily bar restitution. Many restitution claims may be foreclosed even where the Claims Court cannot afford relief, either because there is no substantive basis for a restitution claim in federal law, or alternatively, because past decisions denying restitution under the Tucker Act carry such policy implications that comparable restitution claims under section 702 should be impliedly precluded.²¹² In practice, it

only for abuse of discretion. All of this is consistent with Congress' vision that section 702 "would force the courts to ask and to answer the right questions." H.R. Rep. No. 1656, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6129 (quoting Richard K. Berg of the Administrative Conference).

209. Again, this assumes no special preemptive power in contract actions. Characterization of the claims in the *Maryland* case was helpful only because the court decided that it could reject each argued basis for a Tucker Act claim serially, and so exclude Claims Court possibilities altogether. *Maryland Dep't of Human Resources v. Department of Health & Human Services*, 763 F.2d 1441, 1448-51 (D.C. Cir. 1985).

210. D. DOBBS, REMEDIES § 4.3, at 248 (1973) (arguing for the adequacy requirement where the underlying substance is not unique to equity).

211. See *infra* note 212.

212. For example, ordinary litigants may assert restitution claims when a defendant is unjustly enriched by her honest error. D. DOBBS, REMEDIES § 4.1, at 224 (1973). Litigants against the government, however, may not assert such claims for lack of a substantive basis. *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1008-09 (Ct. Cl. 1967).

Prior to 1976, the Tucker Act was construed as permitting specific restitution of monies unlawfully taken or acquired by the government. The *Eastport* decision reads "money relief" as including return (specific restitution) of specific

makes a big difference which alternative rationale we apply. For example, substitutionary restitution is frequently awarded as an alternative measure of recovery in both contract and tort, competing with the damage measure.²¹³ Precluding substitutionary restitution in section 702 cases would remove a threat to the integrity of statutes permitting damages. If such relief is barred in all section 702 cases, however, rather than only those in which the Tucker Act damages structure may be threatened by a competing measure of recovery, this consistency is gained at the cost of foreclosing any remedy where substitutionary restitution is the only otherwise available relief.²¹⁴

VII. CONCLUSION

The 1976 waiver of sovereign immunity in section 702 for "relief other than money damages" creates three special problems of interpretation. In *Bowen v. Massachusetts*, the Supreme Court responded with sound basic tests as to two of those three issues, but invited chaos in its subtests. The Court ruled that requests for nondamage relief should be taken at face value, rather than reconstrued as damages. It went on, however, to confuse lower courts with its multitude of distinctions. Next the Court ruled appropriately that nondamage relief should be available in the district courts where the Claims Court damages provide inadequate relief. *Bowen* invites rebellion, however, because of its unprecedented approach to adequacy, defining it categorically, rather than by the individual claim.

This Article has suggested better ways of defining both relief other than damages and the adequacy requirement. Finally, on the issue untouched by *Bowen*, the author urges that mere gaps in the remedies provided by the Tucker Act should not be construed as impliedly precluding section 702 relief. In short, availability of nondamage relief should turn upon its appropriateness, not upon categorical judgments by type of case.

monies acquired by the government in violation of constitutional, statutory, or regulatory requirements. *Id.* at 1007-09. See also *United States v. Testan*, 424 U.S. 392, 400 (1976) (quoting with approval key language from *Eastport*).

Substitutionary restitution is pointedly omitted from the *Eastport* formula. Nevertheless, the Supreme Court formerly used quasi-contract (substitutionary restitution) language in approving recovery in inverse condemnation, see, e.g., *United States v. North Am. Transp. & Trading Co.*, 253 U.S. 330, 335 (1920); further, a powerful article has urged an expanded reading of Tucker Act "contracts" to include contracts implied in law (again substitutionary restitution), noting that many courts have awarded such recoveries without discussion of the limits of Tucker Act waiver. Wall & Childres, *The Law of Restitution and the Federal Government*, 66 NW. U.L. REV. 587 (1971). With these qualifications, it is settled that the Tucker Act admits no restitutionary recovery except by way of specific monetary relief. See, e.g., *Merritt v. United States*, 267 U.S. 338, 341 (1925); *Sutton v. United States*, 256 U.S. 575, 581 (1921).

213. *Acme Process Equip. Co. v. United States*, 347 F.2d 509 (Ct. Cl. 1965), *rev'd on other grounds*, 385 U.S. 138 (1966) (contract); *Felder v. Reeth*, 34 F.2d 744 (9th Cir. 1929) (tort); cf. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2744 n.2 (1988) (Scalia, J., dissenting).

214. The majority in *Bowen* assumes without deciding that federal common law supports a substantive claim in restitution. This follows from its ratification of the state's claim despite doubt that the Tucker Act allows suit. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2738 n.42; but see dissent of Justice Scalia, *id.* at 2747 (appearing to have the better of the Tucker Act argument). If restitution is now generally available outside the Tucker Act, then section 702 restitution claims, like any other section 702 claims, should be denied where inappropriate because of adequate Claims Court or other remedies.

